United States Court of Appeals

for the Second Circuit

APPENDIX

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76-6199 & 77-4176

UNITED STATES COURT OF APPEALS
FILED
JAN 05 1979
SECOND CIRCUIT

United States Court of Appeals

For the Second Circuit.

THE LONG ISLAND RAIL ROAD COMPANY,
Appellant,

against

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE INTERSTATE COMMERCE COMMISSION.

APPENDIX.

Volume II—Pages 503a to 809a.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1978

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

THE LONG ISLAND RAIL ROAD COMPANY,

Appellant,

against

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE INTERSTATE COMMERCE COMMISSION.

- -X

OFFICE OF THE SECRETARY

FILE INDEXING SHEET

CASE ON APPEAL

NO. 77-4176 | CIR. 2nd

THE LONG ISLAND RAIL ROAD COMPANY v. THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

COMMISSION PROCEEDING	DOCKET NO.	TITLE
	36516	SWITCH CONNECTION CHARGE AT BETHPAGE, N. Y., LONG ISLAND RAILROAD

VOLUME I

DOCKET ENTRIES.

504a

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
1.	LETTER: Transmitting a VERIFIED COMPLAINT, PROTEST and PETITION for suspension; and advising this matter requires expedited handling.	1/12/77	38	GENERAL MOTORS CORPORATION (by B. T. Buck)
2.	LETTER: Addressed to Albert H. Fitzgerald, correcting a typographical error in the complaint, protest and petition in item next above.	1/13/77	1	GENERAL MOTORS CORPORATION (by R. A. Mehley)
3.	REPLY: To complaint, protest and petition in item #1 above.	1/25/77	33	LONG ISLAND RAIL ROAD COMPANY (by W. J. Myskowski)
4.	PETITION: For reconsideration.	1/27/77	10	GENERAL MOTORS CORPORATION (by R. A Mehley)
5.	ORDER: That an investigation is instituted into and concerning the lawfulness of specified rates, charges, rules, regulations and practices contained in specified schedules; that the respondent is required to keep account of all amounts received, specifying by whom and in whose behalf the amounts resulting from the rates, charges, rules, regulations and practices contained in the schedules subject to this investigation	1/28/77	1	SUSPENSION AND FOURTH SECTION BOARD, Members Fitzgeral and Halvarson

(Cont'd)

505a

DOCKET ENTRIES

OFFICE OF THE SECRETARY

FILE INDEXING CONTINUATION SHEET

CASE ON APPEAL

THE LONG ISLAND RAIL ROAD COMPANY V THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

NO. 77-4176

CIR. 2nd

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
5.	(Continued) were paid, pursuant to section 15(8)(e) of the IC Act, as amended by section 202(e)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976; and that the carrier party to the specified schedules is made respondent.			
6.	ORDER: That this proceeding be handled under modified procedure; opening statement of facts and argument due 20 days from 1/31/77; statement of facts and argument by protestants due 30 days after that date; and reply due 20 days thereafter; and that protestant(s) shall timely advise respondent and this Commission of the identity, including addresses, of the individuals composing the protestant's (s') defense committee, if any, together with an indication of the number of copies of respondent's (s') statement which are desired, and to whom the copies are to be sent.	1/31/77	1	COMMISSIONER O'NEAL
7.	OPENING STATEMENT OF FACTS AND ARGUMENT	2/16/77	40	LONG ISLAND RAIL ROAD COMPANY (by W. J. Myskowski)
8.	LETTER: Addressed to Janice M. Rosenak, requesting that this matter be set down for cross-examination as promptly as possible.	3/9/77	3	GENERAL MOTORS CORPORATION (by B. T. Buck)

DOCKET ENTRIES

OFFICE OF THE SECRETARY

FILE INDEXING CONTINUATION SHEET

CASE ON APPEAL

THE LONG ISLAND RAIL ROAD COMPANY V THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

NO. 77-4176

CIR. 2nd

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
9.	TELEGRAM: Addressed to Janice M. Rosenak, requesting an extension of 10 days in which to file protestant's statement of facts and argument.	3/22/77	1	GENERAL MOTORS CORPORATION (by B. T. Buck)
10.	ORDER: That the request for oral hearing in letter item #8 above is denied; that on 3/24/77 and thereafter, respondent make available to protestant the Rail Form A study and the underlying workpapers for the purposes of inspection and copying; and that the due date for protestant's opening statement of fact and argument is extended to 4/4/77.	3/24/77	2	COMMISSIONER O'NEAL
11.	OPENING STATEMENT OF FACTS AND ARGUMENT	4/4/77	126	GENERAL MOTORS CORPORATION (by B. T. Buck)
12.	REPLY STATEMENT OF FACTS AND ARGUMENT	4/25/77	40	THE LONG ISLAND RAIL ROAD COMPANY (by W. J. Myskowski)
13.	ORDER: That this proceeding, the evidentiary record having been completed, is assigned to Review Board Number 4.	Dated 4/27/77	1	COMMISSIONER HARDIN

OFFICE OF THE SECRETARY

FILE INDEXING CONTINUATION SHEET

CASE ON APPEAL

THE LONG ISLAND RAIL ROAD COMPANY V THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

NO. 77-4176

CIR. 2nd

DOCKET ENTRIES

507a

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
14.	NOTICE: Of Determination of Market Dominance.	5/4/77	1	DIVISION 2, Commissioners Hardin, Murphy, and Clapp
15.	REPORT AND ORDER: That a separate charge for maintaining a switch connection on a private sidetrack of General Motors Corporation at Bethpage, N. Y., found not shown to be just and reasonable; that respondent is notified and required to cancel, on or before 35 days from 9/7/77, the schedules named, upon not less than 1 days notice; that respondent refund any amounts collected pursuant to such rates during the period of the investigation; and that this proceeding is discontinued. NOTICE: By this order, this proceeding is rendered administratively final in conformity with section 15(8)(a) of the IC Act and within the meaning of section 704 of the Administrative Procedure Act.	9/7/77	15	DIVISION 2, Commissioners Hardin, Murphy, and Clapp, Commissioner Hardin did not participate
16.	PETITION: For a stay of the effective date of the order in item next above pending judicial review.	10/5/77	7	THE LONG ISLAND RAIL ROAD COMPANY (by R. H. Stokes)

OFFICE OF THE SECRETARY

FILE INDEXING CONTINUATION SHEET

CASE ON APPEAL

THE LONG ISLAND RAIL ROAD COMPANY V THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

NO. 77-4176

CIR. 2nd

DOCKET ENTRIES

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
17.	ORDER: That the request in item next above is denied.	10/14/77	2	CHAIRMAN O'NEAL
18.	NOTICE: A court action was instituted on or about 10/5/77, involving this proceeding before the U. S. Court of Appeals for the Second Circuit.	10/19/77	1	H. G. HOMME, JR., Acting Secretary
		Total Pages	323	
	END OF VOLUME 1 AND THIS PROCEEDING			

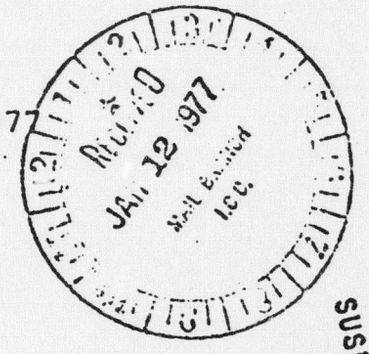
LETTER, DATED JANUARY 12, 1977, TRANSMITTING VERIFIED COMPLAINT.

LAW OFFICES
MACDONALD & MCINERNY
1000 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

DAVID G. MACDONALD
FRANCIS W. McINERNY
JOHN GUANDOLO
HARRY J. JORDAN
RICHARD A. MEHLEY

TELEPHONE
783-8131

January 12, 1977



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The Honorable
Robert L. Oswald
Secretary
Interstate Commerce Commission
12th & Constitution, N.W.
Washington, D.C. 20423

RECEIVED
JAN 12 3 00 PM '77
I.C.C.
SUSPENSION BOARD

Re: Long Island Railroad Freight Tariff No. 72
Issued December 14, 1976, becoming
Effective January 15, 1977

Dear Sir:

Please accept for filing the original and six copies of a verified complaint protest and petition for suspension of the above-noted proposal. This matter requires expedited handling for the reason that General Motors, the only shipper or receiver to be affected by the proposal did not receive notice of the proposal until January 11, 1977. As the body of the petition points out, it appears that the carrier misdirected notice of the filing to General Motors, i.e., it sent the copy of the proposal to Edgewood, New Jersey rather than to General Motors office address at Inglewood, New Jersey. It is clear that because of the carrier's failure to comply with the notice provisions governing the publication of schedules such as that involved here, waiver of the procedural rules is fully warranted, including that rule requiring the filing of protests twelve days prior to the effective date of the schedule.

It is respectfully requested that notice of any action taken on this matter be made by telephone to the undersigned.

This will also serve to certify that a conformed copy of the enclosed pleadings has been served by airmail this date on the carrier's tariff publishing agent.

Very truly yours,

Francis W. McInerny

FWM/g

Enclosure

VERIFIED COMPLAINT.
Before The

INTERSTATE COMMERCE COMMISSION

Washington, D.C.

Suspension and Fourth Section Board No. _____

VERIFIED COMPLAINT, PROTEST AND PETITION
FOR SUSPENSION AND REQUEST FOR WAIVER
OF TIME LIMIT, AND REQUEST THAT COMMISSION,
UPON ITS OWN MOTION, SUSPEND AND
INVESTIGATE THE LONG ISLAND RAIL ROAD COMPANY
FREIGHT TARIFF 72, I.C.C. 1119,
EFFECTIVE JANUARY 15, 1977

GENERAL MOTORS CORPORATION

Protestant

By: Benson T. Buck

Francis W. McInerny
John Guandolo
Richard A. Mehley

Its Attorneys

Dated: January 12, 1976

VERIFIED COMPLAINT
Before The
INTERSTATE COMMERCE COMMISSION
Washington, D.C.

Suspension and Fourth Section Board No. _____

VERIFIED COMPLAINT, PROTEST AND PETITION
FOR SUSPENSION AND REQUEST FOR WAIVER
OF TIME LIMIT, AND REQUEST THAT COMMISSION,
UPON ITS OWN MOTION, SUSPEND AND
INVESTIGATE THE LONG ISLAND RAIL ROAD COMPANY
FREIGHT TARIFF 72, I.C.C. 1119,
EFFECTIVE JANUARY 15, 1977

Comes now General Motors Corporation and respectfully submits this its verified complaint and request for suspension and investigation of the Long Island Railroad Freight Tariff No. 72, a copy of which is attached as Appendix A. If this protest and petition for suspension is not deemed timely under the Commission's rules and said time requirement cannot be waived, as requested herein, then complainant requests that the Commission on its own motion and, for the reason set forth below, suspend and investigate the instant tariff.

VERIFIED COMPLAINT

I

Involved Tariff Supplement

The assailed tariff supplement seeks to impose a per-car charge on all traffic delivered to complainant's facility at Bethpage, Long Island, New York. The charge applies only to General Motors and is in addition to the line haul rate paid for the involved transportation, and violates Sections 1, 2 and 3 of the Interstate Commerce Act (49 U.S.C. §1, 2 and 3).

II

Background To Tariff Supplement

In 1965, complainant's side track at Bethpage, N.Y. was placed into service, with the Long Island Railroad assuming the maintenance cost for the switch connection and that portion of the side track located within its right-of-way and complainant assuming the maintenance of the remainder of the side track. In the early 1970's, the Long Island Railroad sought to have complainant execute a "side track agreement" whereby it would obligate itself to bear the maintenance expense of the switch connection. The Long Island Railroad threatened to terminate service to complainant's side track. The United States District Court for the Eastern District of New York enjoined

Long Island from withholding rail service to General Motors, and the matter was referred to the Commission for consideration.

The Commission's decision in General Motors Corp., R.I. Priv. Side Track, 351 I.C.C. 691 concluded that the switch maintenance costs are chargeable to operating expenses and form a part of the rate base that are recovered from operating revenues produced by rates for delivery over the switch connection, and that the Long Island had not established that those line haul rates "do not fully compensate it for the maintenance of a switch connection at issue." (351 I.C.C. at 697) The Commission then concluded: "We find that, on the present record, respondent may not lawfully impose the proposed maintenance charge upon petitioner . . ." (351 I.C.C. at 699) Thus, the Commission's decision specifically prohibits imposition of the proposed surcharge or per car charge. See attached Appendix B.

That decision has been affirmed by the District Court and is now pending before the Court of Appeals for the second circuit.

III

Request For Acceptance Of Late Filed Protest And Petition For Suspension

A. Good Cause Exists For Waiving Time Requirement

As indicated above, the involved tariff has not yet

become effective. Complainant is aware that the Commission's regulations require protests and petitions for suspension to be filed 12 days prior to the effective date of the assailed tariff provision, yet it believes that good cause exists for waiving that rule in the situation here.

First, it is clear from the tariff provision itself that complainant - General Motors Corporation -- is the only shipper affected by the switching charge, yet no copy of the tariff provision was served upon complainant. General Motors did not learn of this tariff filing until about January 11, 1977, through conversation with the Long Island Railroad's tariff publishing agent. Commission regulations require that carriers serve copies of tariffs upon "subscribers." (49 C.F.R. §1300.30) This was an independent publication by the Long Island Railroad and General Motors is a subscriber to the Long Island's tariff. Despite this, and the fact that it is the only shipper affected by the instant proposal, no copy of this tariff was served upon General Motors. Representatives of General Motors today conducted an investigation to determine why such tariff was not received. Conversations with the same tariff publishing agent indicate that the tariff was erroneously mailed to Edgewood, N.J., rather than Englewood, N.J. Thus, no copy of the tariff was in fact received by General Motors.

B. The Commission Should Suspend And Investigate

The involved charge is in addition to the line haul rate presently paid by complainant for the movement of its traffic from origin to destination, which includes delivery to the side track at Bethpage, N.Y. The proposed charge would increase that line haul rate and is wholly unreasonable, discriminatory and highly prejudicial to General Motors. No other shippers with private side tracks are affected by the instant charge, making it prima facie discriminatory against, and prejudicial to, complainant.

Further, the instant proposal constitutes a collateral attack upon the Commission's decision in General Motors Corp., supra, and would clearly subvert the Commission's finding in that decision without any showing whatsoever that the charges are in fact just and unreasonable. It is clear from the Commission's decision in that case that such a charge is wholly unjust and unreasonable and discriminates against, and is prejudicial to, complainant General Motors. The Commission in that decision concluded that:

> "Moreover, maintenance costs are usually chargeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor

> has respondent established the reasonableness of the additional maintenance charges. See Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973)." (351 ICC at 697, 698)

And the Court, in affirming the Commission's decision, concluded that:

> "In the final analysis, the point is not that the LIRR is precluded from recovering the costs of the switch connection by either an increase in the line haul rates or a separate reasonable maintenance charge, but that it has failed to demonstrate that it currently is undercompensated for these costs." (Appendix C, p. 10)

A copy of that decision is attached. (Appendix C) To our knowledge, there is no demonstration by the Long Island Railroad that the switch maintenance costs are not covered by the line-haul rate.

It is clear from the quoted material that the instant proposal is unjust and unreasonable, highly discriminatory and prejudicial to complaint.

In addition, about 90 percent of this traffic moves via the Long Island Railroad, so that that carrier has market dominance on the movement of this traffic. Failure to suspend this tariff will cause substantial injury to the complaint, in view of the fact that it has 500 to 650 cars per year delivered at Bethpage. The proposed increase would result in an increase in General Motors rail costs on Bethpage traffic of from $25,000 to $30,000 per annum.*/ Given the history of this proceeding, it is manifest that

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*/ See footnote, page 7.

there is a strong likelihood that complainant will prevail in this proceeding. It is for these reasons that the instant proposal should be suspended and set for investigation.

IV

Commission Should Investigate And Suspend Upon Its Own Motion

If the Commission cannot grant complainant's request for waiver of the time requirement and consideration of its protest and petition for suspension, it can and should, upon its own motion, suspend and investigate the assailed tariff provision. Complainant believes that the reasons set forth above constitute good and sufficient reason for the Commission, upon its own motion, to invoke its suspension and investigation powers, and it is urged that it do so in this matter. Moreover, numerous Commission decisions make it clear that the Commission can and will suspend upon its own motion where the circumstances warrant such action. Complainant believes that the foregoing facts amply justify the exercise of that power here.

.....

*/ The Court decision noted that the Long Island Railroad, in its Brief to the Commission, stated that the average annual maintenance cost of the General Motors' switch connection and private siding is $3,266.80. (See Appendix C, footnote 2)

VERIFIED COMPLAINT

Dated at Washington D.C. January 12, 1977.

Benson T. Buck
3044 West Grand Blvd.
Detroit Michigan 48202

VERIFICATION

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

I, Benson T. Buck, being duly sworn, deposes and says: that he is Attorney in charge of Transportation, General Motors Corporation, the petitioner and complainant herein; that he has read the foregoing petition and complaint and knows the contents thereof and that the allegations of fact are true as stated except as to matters and things, if any, stated on information and belief and as to those matters and things he believes them to be true. Affiant further states that the tariff publishing agent, Mr. J. L. Faraci, has been notified of the filing of this document this date, by telephone.

Benson T. Buck

Subscribed in my presence, and sworn to before me, by the affiant above named, this 12th day of January, 1977.

(SEAL)

Evelyn O. Shamrock
Notary Public

Commission expires May 31, 1979

VERIFIED COMPLAINT

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing document upon J. L. Faraci, by airmail, postage prepaid, this 12th day of January, 1977.

Francis W. McInerny

VERIFIED COMPLAINT

I.C.C. 1119

THE LONG ISLAND RAIL ROAD COMPANY

FREIGHT TARIFF 72

LOCAL TARIFF

OF

I.C.C. PUBLIC FILE COPY
RECEIVED
DEC 16 1976
TARIFF EXAMINING BRANCH
BUREAU OF TRAFFIC

CHARGES FOR MAINTENANCE
OF PRIVATE SIDING
SWITCH CONNECTIONS AT
STATIONS ON

THE LONG ISLAND RAIL ROAD COMPANY
AS SHOWN HEREIN

INTRASTATE APPLICATION

This Tariff also applies on Intrastate Traffic in the State of New York.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED DECEMBER 14, 1976 EFFECTIVE JANUARY 15, 1977

Issued by
J. L. FARACI
Manager-Pricing & Divisions
P. O. Box 1508
Long Island City, New York 11101

VERIFIED COMPLAINT
FREIGHT TARIFF 72

APPLICATION

The provisions of this tariff will apply to all carload traffic originating at or destined to points on The Long Island Rail Road Company when such traffic is received at or requires delivery to locations served by private sidings, where no contractual arrangement exists for the maintenance of switch connection to such private siding.

DEFINITION OF THE TERM - "SWITCH CONNECTION"

The term, Switch Connection, as used herein includes the right-of-way lead tracks on railroad property and the necessary switch or switches required to make the connection between the railroad and the private siding.

♦ CHARGES

All carload traffic originating at or destined to points on The Long Island Rail Road Company received at or requiring delivery to locations served by private sidings at stations on The Long Island Rail Road Company, where no contractual arrangement exists for the maintenance of switch connection to such private siding, will be subject to an additional charge for maintenance of the private side track Switch Connection as shown herein. Such charge will be assessed against the shipper on traffic originating at points on The Long Island Rail Road Company and against the consignee on traffic consigned to points on The Long Island Rail Road Company. The charges named herein shall be in addition to the line haul transportation charge and all other charges applicable to the shipment in accordance with tariffs lawfully on file with the Interstate Commerce Commission and shall accrue entirely to The Long Island Rail Road Company.

Station	Private Siding Serving	Charge In Cents Per Car
Bethpage, NY	General Motors	439

♦ Increase.

VERIFIED COMPLAINT

Served March 17, 1976

30849

INTERSTATE COMMERCE COMMISSION

No. 35790

JOINT PETITION FOR DECLARATORY ORDER—PRIVATE SIDETRACK—GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAIL ROAD COMPANY

Decided February 3, 1976

Upon reconsideration, carrier's attempt to condition continued rail service at shipper's private sidetrack upon that shipper's agreement to bear the switch connection maintenance expense found unlawful. Prior decision affirmed and proceeding discontinued.

Benson T. Buck and *Leonard F. Charla* for petitioner.

Walter J. Myskowski, George M. Onken, and *Richard H. Stokes,* for respondent.

John F. Donelan and *Frederic L. Wood* for intervener.

REPORT AND ORDER UPON RECONSIDERATION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CORBER, ACTING AS AN APPELLATE DIVISION

BY THE DIVISION:

In the prior decision and order, decided June 10, 1975 (not printed), we affirmed the initial decision of the Administrative Law Judge, holding that the Long Island Rail Road Company (LIRR or respondent) may not lawfully precondition continued rail service to the private sidetrack of General Motors Corporation (General Motors or petitioner) upon General Motors' agreement to bear the maintenance expenses for the switch connection to that private sidetrack. We now reopen this proceeding upon our own motion in order to clarify several issues arising in connection with section 1(9) of the Interstate Commerce Act (Act).

General Motors maintains a warehousing and distribution facility at Bethpage, N.Y., receiving an average of 10 to 15 carloads of automobile and truck parts per week. The LIRR provides rail service to this facility by way of a switch connection and private sidetrack extending from the LIRR's main line. At the time the

sidetrack was constructed, the LIRR's prevailing policy dictated that the railroad would pay for the construction of the sidetrack from the switch point to that point of the sidetrack just clear of the railroad's right-of-way, while General Motors would pay the construction cost for the remainder of the sidetrack. Similarly, since 1965, when the private sidetrack was first placed into service, the LIRR has assumed the expense of maintaing the switch connection and that portion of sidetrack located within its right-of-way, while petitioner has paid for the maintenance of the remainder of the sidetrack. In the interim since service was first initiated over the switch connection, the LIRR's financial condition has deteriorated so that, according to the railroad, the LIRR can no longer afford to absorb the switch connection maintenance expenses.

To relieve its financial dilemma, the LIRR sought to require General Motors and other private sidetrack users to bear the entire maintenance expense attributable to private sidetracks, including those expenses formerly absorbed by the railroad for switch connections located within its right-of-way. Upon General Motors' refusal to execute a sidetrack agreement obligating itself to bear the switch connection maintenance expense, respondent threatened to terminate service to General Motors' sidetrack. Thereupon, General Motors obtained a temporary restraining order in the United States District Court for the Eastern District of New York, enjoining the LIRR from halting rail service. That restraining order remains in effect, pending the Commission's resolution of the respective rights and duties attending the involved switch connection. The National Industrial Traffic League has intervened in support of General Motors.

In the initial decision, the Administrative Law Judge concluded that the involved switch connection is a part of respondent's overall transportation facility, and thus, is to be maintained from the line-haul revenues received by the railroad. He further concluded that, inasmuch as respondent's line-haul rates presently include delivery at petitioner's private sidetrack, the maintenance charge, if imposed, amounts to an increased transportation charge, not lawfully published in the carrier's tariffs. He also concluded that, as long as petitioner continues to furnish sufficient business, respondent is obligated to operate and maintain the switch connection. Upon these conclusions, the Administrative Law Judge found that

VERIFIED COMPLAINT

523a

respondent could neither lawfully impose the maintenance charge upon General Motors nor lawfully terminate service to General Motors' sidetrack. As previously indicated, we adopted these conclusions and findings as our own.

Respondent defends its levy of switch connection maintenance charges upon the language of section 1(9) of the Act, which, when given its plain meaning, allegedly authorizes a carrier to impose maintenance charges upon the shipper being served by a particular switch connection. In support of its position, the LIRR emphasizes the following underscored portions of section 1(9):

> Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate *upon reasonable terms* a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install *and operate* any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and *reasonable compensation therefor*, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The LIRR contends that this statutory language is clear and not subject to reasonable dispute insofar as it authorizes a carrier to condition service over a switch connection upon a maintenance agreement. Respondent further notes that section 1(9) draws no distinction between switch connections located within the railroad right-of-way and those located outside the railroad right-of-way.

Respondent also argues that prior Commission decisions have recognized a carrier's authority to impose switch connection maintenance charges upon a shipper and that, therefore, our affirmance of the initial decision violates Commission precedent. The LIRR cites *Merchants Refrigeration Co.* v. *New York Central R. Co.*, 238 I.C.C. 599, a 1940 decision wherein the Commission held that a railroad could recoup from a shipper the cost of constructing and maintaining an elevated spur track serving the

524a VERIFIED COMPLAINT

shipper's private facility. Respondent argues that, in the cited case, the Commission described section 1(9) as containing an unqualified grant of authority to carriers to impose maintenance agreements upon shippers served by switch connections.

The cited case also allegedly establishes maintenance charges to be in the nature of rent, as distinguished from transportation charges subject to tariff publication. This distinction between so-called rents and transportation charges is based upon the decision in *Ziegler Bros. v. Southern Ry. Co.*, 157 I.C.C. 660 (1929), another case cited by respondent in support of its argument. In that case, the Commission concluded that it did not have jurisdiction to review the reasonableness of a contract setting out the terms under which a switch connection and private sidetrack were constructed. Respondent urges the Commission to adopt the rationale of the *Ziegler Bros.* decision and hold that contractual obligations incident to switch connections are outside the Commission's jurisdiction.

The LIRR assails our conclusion that the railroad is obligated to maintain and operate the switch connection as long as General Motors continues to furnish sufficient business at its private sidetrack. Our adoption of the "sufficient business" criterion, which comes from the statutory language of section 1(9), is allegedly improper because that section of the Act employs the "sufficient business" criterion only in relation to switch connections which are operated under a contractual arrangement setting out "reasonable terms." Here, the railroad contends, the maintenance and operation of the switch connection is being compelled without the benefit of any terms at all.

Respondent points out that a carrier who is ordered by the Commission to install a switch connection may, pursuant to section 1(9), be entitled to compensation, if the Commission so determines. Therefore, the LIRR argues, a carrier who voluntarily installs a switch connection should similarly be entitled to compensation.

Respondent also challenges our conclusion that, under the present line-haul rates, the LIRR must deliver petitioner's traffic to its private sidetrack and therefore, the railroad must look to its line-haul revenue to recoup its switch connection maintenance expense. According to the LIRR, its transportation obligation would be satisfactorily fulfilled if General Motors' traffic were diverted to the public team tracks at Hicksville (3 miles distant) or at Farmingdale (2 miles distant). Respondent alleges that under the present circumstances placement of cars at the private siding is more costly than is placement at public team tracks and that, accordingly, petitioner's traffic unduly burdens other interstate commerce. Continued absorption of the maintenance expenses is allegedly unjustly discriminatory and unduly prejudicial to smaller shippers who have no private facilities. Thus, the LIRR suggests, these smaller shippers are, in effect, subsidizing the private facilities of General Motors.

Respondent further argues that the presumption that respondent's line-haul revenues are adequate to cover switch connection maintenance expenses is unfounded in light of the LIRR's nonparticipation in recent general increases. In this regard, our prior decision allegedly ignores our recent conclusions in other cases as to the uneven effects of general rate increases and the inadequacy of current railroad revenue division agreements.

Petitioner and intervener maintain that the initial decision properly construes section 1(9) and that the cases cited by respondent in support of its position are distinguishable on their facts. General Motors insists that the switch connection is a necessary and essential part of the LIRR's transportation facility which respondent is obligated to maintain from its line-haul revenues. Any imposition of maintenance charges or termination of rail service to petitioner's sidetrack would purportedly be an unlawful increase in rates and a violation of sections 1 and 6 of the Act. Petitioner denies that service to its sidetrack constitutes an unjust discrimination or undue preference and asserts that the LIRR must continue service over the switch connection as long as sufficient business at the sidetrack continues.

Discussion and Conclusions

Among the various obligations of a common carrier by rail is the duty to establish switch connections, as set out in section 1(9) of the Act. The first sentence of that section obligates a carrier to establish a switch connection with a lateral branch line or a private sidetrack once certain specified conditions are determined to exist. The second sentence of that section prescribes a remedy for shippers or branch line owners who are unable to secure a voluntarily established switch connection. Since the switch connection involved here was voluntarily established, our concern in this proceeding is the proper interpretation of the first provision of

section 1(9), that is, the carrier's obligation to construct, maintain, and operate a switch connection.

Contrary to respondent's argument, a carrier's obligation to establish a switch connection is not to be determined by the presence or absence of a contractual arrangement setting out "reasonable terms." Rather, the plain meaning of the statute suggests that a carrier's obligation with regard to switch connections is qualified by the following three conditions: that the switch connection is reasonably practicable; that the switch connection can be installed and operated with safety; and that the switch connection will furnish sufficient business to justify its construction and maintenance.

Apparently satisfied that the necessary conditions were present, the LIRR constructed the switch connection at its own expense and similarly absorbed the maintenance expense for that connection up until the time the present controversy arose. This practice of absorbing the construction and maintenance expenses is in accord with section 1(6) of the Act, which, in part, requires rail carriers to adopt and observe just and reasonable practices for the safe and prompt delivery of freight. In light of respondent's prior absorption of maintenance of expenses, we do not believe that respondent's attempt to transfer the switch connection maintenance obligation to petitioner is consistent with the carrier's obligation to deliver petitioner's freight. The task of delivering freight is an integral of the transportation obligation, and therefore, as a general rule, the delivery of freight is a service performed under a carrier's line-haul rate. Correspondingly, the expenses attributable to delivering freight should generally be met from a carrier's line-haul revenues. See *Propriety of Operating Practices—Packing Sheds*, 246 I.C.C. 273, 283 (1941), and *Split Deliveries and Drayage Allowance at New York*, 245 I.C.C. 40, 41 (1941). In the case of the LIRR, the switch connection in question was a part of the railroad's general transportation facility, paid for and maintained from the line-haul revenues of the railroad. Under the LIRR's line-haul rates, traffic was picked up and delivered at General Motors' sidetrack, without any obligation on the part of the shipper to maintain the switch connection making that service possible. Respondent has neither alleged nor shown any adverse change in the practicability or the safety of the switch connection or in the sufficiency of business to and from General Motors' sidetrack. Therefore, in the absence of a change in one of the conditions set out in section 1(9), respondent's statutory obligation to provide switch connection service remains.

Respondent's reliance on *Merchants Refrigeration*, *supra*, is misplaced, for that case should be distinguished on its facts. That decision involved quarterly payments which were imposed upon the shipper from the outset of rail service over a newly constructed, elevated spur. In the cited case, service over the elevated spur was initiated upon the condition that the shipper undertake to reimburse the carrier by making so-called rent payments, which were designed to compensate the carrier for the cost of acquiring the right-of-way, the cost of constructing and maintaining the spur, and a return on investment.

The same distinguishing fact existed in the *Ziegler Bros.* case, *supra*, where the assailed payments arose pursuant to a valid construction contract executed by the shipper and carrier prior to the installation of the switch connection. Again, service over the switch connection was conditioned from the outset upon the shipper's undertaking to compensate the carrier for the costs associated with the switch connection. In regard to the *Ziegler Bros.* decision, we note that the Commission found that it lacked jurisdiction to determine the lawfulness of the particular contractual obligations at issue therein. We now find that this disclaimer of jurisdiction was unduly broad. Section 1(9) was enacted to facilitate the installation of switch connections. The purpose of section 1(9) can be defeated just as well by failure to operate a switch connection on reasonable terms as by a refusal to construct in the first instance. Had the Commission ordered the construction of the switch connection here in issue, that order upon the application of a party to the agreement upon the showing of changed circumstances could, without doubt, be modified by the Commission. While the Commission has been careful not to interfere with contractual disputes concerning costs of construction and maintenance of switch connections, *Merchants* case, *supra*, it is inconsistent to hold that the Commission can prescribe reasonable compensation for construction when it orders institution, but can not review the reasonableness of such compensation if voluntarily agreed to by the parties. Moreover, maintenance costs are usually chargeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent

VERIFIED COMPLAINT 525a

established the reasonableness of the additional maintenance charges. See *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973).

The Commission has broad authority to investigate and resolve allegations of unjust discrimination and undue preference or prejudice. See *United States* v. *Baltimore & O. R. Co.*, 333 U.S. 169 (1948). However, respondent errs in suggesting that its absorption of maintenance expenses unjustly discriminates against or unduly prejudices smaller shippers not having a private sidetrack upon which to accept delivery of their traffic. The existence of separate delivery facilities, one of which is dedicated to purely private use, while the other serves the public at large, does indeed constitute differing levels of service, but such differing levels of service does not, in this situation, constitute unjust discrimination nor undue preference or prejudice. The levels of service correspond to the volume of traffic generated by a particular facility, and the record contains no intimation that an equivalent switch connection is not readily available to all shippers having the same or greater volume of traffic interchanged as does petitioner. Volume of traffic is the criterion legislatively prescribed by section 1(9), which requires a carrier to establish a switch connection only where that connection "* * * will furnish sufficient business to justify * * * (its) construction and maintenance."

Respondent also errs in suggesting that smaller shippers are subsidizing the private facilities of General Motors by paying the same line-haul charges as petitioner while being relegated to team track delivery. The railroad's contention that private sidetrack placement is more costly than public team track placement ignores the fact that these facilities are part and parcel of the same transportation system and that existence of one enables the other to operate efficiently. The congestion and inconvenience that would presumably attend the diversion of private sidetrack traffic to public facilities would make public team track placement more costly than it presently is and would raise substantial questions as to the LIRR's compliance with section 1(6).

We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is

526a VERIFIED COMPLAINT

reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial. See *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), citing *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968) and *Unloading Lumber at New York Harbor*, 256 I.C.C. 463 (1943). Contrary to respondent's contention, the record before us contains no basis for concluding that the LIRR's recent financial deficits and its nonparticipation in recent general increases constitute a sufficient substitute for showing the reasonableness of its maintenance charge.

We find that, on the present record, respondent may not lawfully impose the proposed maintenance charge upon petitioner and that, in the absence of a change in the practicability, safety, or sufficiency of traffic to petitioner's sidetrack, respondent may not terminate service over the involved switch connection.

COMMISSIONER CORDER, concurs in the result.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 3, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX C

VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK 11201

CHAMBERS OF
JACOB MISHLER
CHIEF JUDGE

November 19, 1976

TO ALL INTERESTED PARTIES
(See Attached)

Re: Docket No. 72-C-1549
General Motors v. L.I.R.R.

Gentlemen:

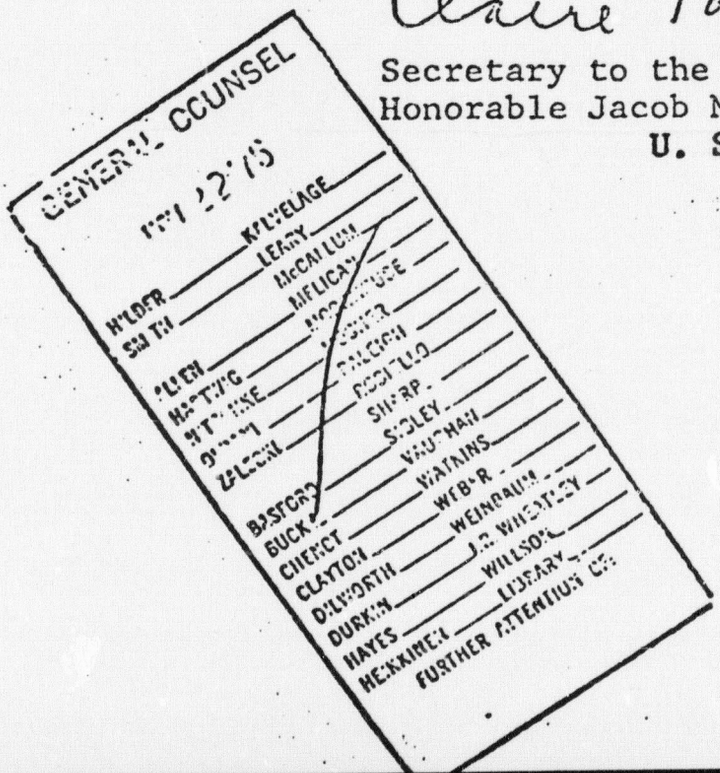
At the direction of Judge Mishler I enclose herewith copy of memorandum of decision and order filed this day in the above matter.

Very truly yours,

Claire Foy

Secretary to the
Honorable Jacob Mishler
U. S. D. J.

enclosure



Carey
Marshall Spradling
Slater
Burke
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Book
File

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VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -

72 C 1549

GENERAL MOTORS CORP.,

Plaintiff,

-against-

Memorandum of Decision and Order

THE LONG ISLAND RAIL ROAD COMPANY,

November 19, 1976

Defendant.

- - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

Plaintiff seeks an order affirming a decision of the Interstate Commerce Commission and permanently enjoining suspension of rail freight service over a switch connection maintained by the defendant. Jurisdiction here is predicated on §17(9) of the Interstate Commerce Act, 49 U.S.C. §17(9), and 28 U.S.C. §§1336, 1337 and 1398.

The General Motors Corporation (GMC) is a Delaware corporation, licensed to transact business in the State of New York. One of the company's unincorporated divisions, General Motors Parts Division, is located in Bethpage, Long Island. From its Parts Distribution Center in

Bethpage, GMC conducts warehousing and distribution operations, receiving an average of ten to fifteen rail freight carloads of automobile and truck parts each week. The defendant, the Long Island Rail Road Company (LIRR), a rail freight carrier, provides rail service to the parts facility's private sidetrack by way of a switch connection. It is over the maintenance cost of the switch connection that the parties—the giant of automobile manufacturers and a less than thriving railroad—do battle.

In 1965, when the Bethpage sidetrack was placed in service, the LIRR bore the expense of maintaining both the switch connection and that portion of the sidetrack located within its right-of-way, while GMC paid for the maintenance of the remainder of the sidetrack. Beginning in 1970, because of its severe financial problems, the LIRR sought to require GMC and other private sidetrack users to assume, by way of a separate charge, the maintenance expenses of their switch connections. When GMC refused to pay the switch connection maintenance costs, the LIRR threatened to terminate service to the Bethpage sidetrack. In response, on November 14, 1972, GMC obtained a temporary restraining order, enjoining the LIRR from halting rail service. Sub-

sequently, pursuant to this court's order of December 7, 1972, the parties submitted the dispute to the Interstate Commerce Commission (ICC). On May 6, 1974, the administrative law judge ruled that the LIRR was adequately compensated for the maintenance expenses of the switch connection and that the LIRR could not halt rail service to the private sidetrack. The decision of the administrative law judge was affirmed by the ICC on June 10, 1975. Upon reconsideration of its own motion, the ICC again affirmed the administrative law judge's ruling. Following this ruling, the plaintiff applied to this court for a permanent injunction restraining defendant from halting service on the sidetrack at the Bethpage facility. The defendant seeks to set aside the decision of the ICC.

Under §1336(b) of 28 United States Code, when a district court refers a dispute to the Interstate Commerce Commission,

> the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

However, the scope of judicial review of the ICC's orders

is strictly limited. 5 U.S.C. §706. The reviewing court is restricted

> to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene.

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536, 66 S.Ct. 687, 698 (1946). See AAACon Auto Transport Inc. v. United States, 317 F. Supp. 1314, 1315 (S.D.N.Y. 1970); Neptune World Wide Moving, Inc. v. United States, 284 F. Supp. 135, 138 (S.D.N.Y. 1968); James Hughes, Inc. v. United States, 292 F. Supp. 372, 373 (S.D.N.Y. 1968). See also Resort Bus Lines, Inc. v. Interstate Commerce Commission, 264 F. Supp. 742, 746 (S.D.N.Y.1967). Thus, this court does not have the power to disturb the ICC's ruling unless it is "contrary to law, arbitrary, capricious, or unsupported by substantial evidence based on the record before it." Seaboard Airline Railroad Co. v. United States, 387 F.2d 651, 656 (Ct.Cl. 1967); see McLean Trucking Co. v. United States, 387 F.2d 657 (Ct.Cl. 1967).

In the present case, the parties were in

essential agreement on the facts. Thus, the only issue for this court is whether the ICC correctly interpreted and applied the relevant statute, §1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9).[1] This statute requires any common rail carrier to construct and maintain on reasonable terms a switch connection between the railroad's own tracks and the private sidetrack of an interstate shipper, provided the switch connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." If the shipper's application to the railroad for a switch connection is refused, the shipper can request an investigation by the ICC, which, after making findings of practicability and safety, may order the carrier to construct the switch connection.

The ICC, in its final decision on reconsideration, General Motors Corp. v. Long Island Rail Road Company, 351 I.C.C. 691 (1976), concluded that GMC had met the statutory criteria of §1(9) entitling it to a switch connection: the connection could be installed and operated with safety; the switch connection was reasonably practicable; and the connection would furnish sufficient

business to justify its construction and maintenance. See Imperial Wheel Co. v. St. Louis, I.M. & S. Ry. Co., 20 I.C.C. 56, 59 (1910). Since there had been no change in these conditions, "respondent's statutory obligation to provide switch connection service remains." Id. at 696. This finding was supported by substantial evidence, and we need not elaborate further. With respect to the LIRR's claim that it was not receiving reasonable compensation, and therefore was entitled to impose a maintenance charge on GMC, the ICC stated:

> An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges.

Id. at 697-98.

In seeking to set aside the ICC's ruling, the LIRR claims that, contrary to the Commission's interpretation, §1(9) requires the shipper to assume the maintenance charges; that a carrier is not required to recoup the cost of maintaining a switch connection from its line haul

rates; and that imposition of separate maintenance costs is necessary to avoid discriminating against other shippers. These arguments are unpersuasive, and we find that the ICC decision as to the adequacy of compensation is supported by substantial evidence and that its interpretation of §1(9) is not unreasonable. Accordingly, the Commission's decision is affirmed.

The basic issue before the ICC was whether the LIRR was receiving reasonable compensation for its maintenance of the switch connection.[12] Between 1954 and 1970, the LIRR was responsible for the construction and maintenance costs of the switch connections.[13] At the same time, however, the switch connection was part of the LIRR's entire freight transportation network. Thus, it was necessary for the LIRR to establish that its line haul rates for freight operations did not fully compensate it for the maintenance costs of the switch connection. It attempted to do this with figures attesting to the railroad's financial deterioration. In 1972, for example, the LIRR had total freight revenues of approximately $9.2 million, total freight operating expenses of about $20.7 million, and a net loss from freight operations of $11.5 million.

While these figures are a dramatic indication of the LIRR's financial plight, they are inconclusive of the issue of whether the line haul rates adequately compensated the railroad for its maintenance of the switch connection. Presumably, the line haul rates reflect the cost to the LIRR of the different aspects of its freight operations. The Commission observed, for example, that "maintenance costs are usually changeable [sic] to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection." 396 I.C.C. at 697. See Valley & Siletz R.R. Co. v. Southern Pacific Co., 53 I.C.C. 397, 399 (1919); Klamath County Chamber of Commerce v. Southern Pacific, 74 I.C.C. 207, 213 (1922). See also Merchants Refrigerating Co. v. N.Y.C.R.Co., 238 I.C.C. 599 (1940). Moreover, figures supplied by an independent consultant hired by the LIRR indicate that the rail traffic to the GMC plant at Bethpage produced at least a marginal profit for the railroad.[14] The large operating deficits incurred by the LIRR's entire freight division could be attributed to any number of factors. To further illustrate the irrelevance of the profit-loss figures for the entire freight operations,

under conceivable circumstances, the LIRR could be making a profit on its overall freight operations, and yet be undercompensated for the maintenance cost of the switch connection on the Bethpage track. In that situation, despite the hypothetical profits from other aspects of the LIRR's freight operation, the railroad would be entitled to adequate compensation for the switch connection maintenance.

The ICC's ruling in Allied Container Corp. v. Maine Central, Dkt. No. 36143 (Apr. 29, 1976), does not compel a different result. In that case, which does not yet represent the views of the ICC, the shipper objected to the railroad's imposition of the costs of constructing and maintaining a switch connection. The ICC applied the rationale of its earlier decision in General Motors, supra, concluding that the customary practice of the Maine Central in requiring the shipper to bear the costs of the switch connection was not unreasonable:

> The evidence demonstrates that Maine Central has maintained the same policy for the past 50 years requiring industry to bear the costs of installation and maintenance of private sidetracks including switch connections and spurs or lead tracks. By so doing defendant has not charged those costs to operating expenses, they have not formed a part of its

> rate base, are not recovered by revenue from the line-haul rates and there is no duplication or over compensation. In fact, since such costs are borne by industry, its rate level should be lower than if those costs were borne by the carrier.

Slip.op. at 7.

By contrast, in the present case, when the Bethpage switch connection was built, the LIRR's policy was not to impose a separate maintenance charge on private sidetrack shippers. By implication, the line haul rates absorbed the maintenance cost of the switch connection. Thus, in 1970, when the LIRR changed its policy of the last sixteen years, and sought to impose an additional maintenance charge, it had the burden of demonstrating that the line haul rates did not already provide adequate compensation for the maintenance of the Bethpage switch connection.

In the final analysis, the point is not that the LIRR is precluded from recovering the costs of the switch connection by either an increase in the line haul rates or a separate reasonable maintenance charge,[15] but that it has failed to demonstrate that it currently is undercompensated for these costs. This was the conclusion of the Commission, and we find that there was substantial

evidence in the record to support it. 6/

Accordingly, we grant the application of the plaintiff for a permanent injunction restraining the LIRR from suspending service to the plaintiff's private track because of GMC's refusal to assume the maintenance cost of the switch connection, and it is

SO ORDERED.

Jacob Mishler

U. S. D. J.

VERIFIED COMPLAINT

FOOTNOTES

/1 Section 1(9) of the Interstate Commerce Act provides:

> Switch connections and tracks. Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, in application therefor in writing by any shipper or owner of such lateral branch line of railroad, such shipper or owner of such lateral branch line of railroad may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

/2 The average annual maintenance cost of the General Motors' switch connection and private siding is $3,266.80 (Exhibit B, Brief of the LIRR Before the Interstate Commerce Commission).

/3 Prior to 1954, the practice of the LIRR was to require industries with private sidings to bear the entire maintenance cost of the switch connection. This practice was changed after 1954 in order to maintain a competitive position in the transportation industry. Since 1970, according to the railroad, increasing deficits in the freight service compelled the return to the original practice of requiring industries to bear the entire cost of their private sidings. Compare Allied Container Corp. v. Maine Central R.R.Co., Dkt. No. FD-36143 (Apr. 29, 1976). General Motors claims that in 1965, when the switch connection was built, the parties implicitly agreed to include its maintenance costs in the line haul rates (Sept. 17, 1976, Tr. 27-28). While the line haul rates were not increased at that time, nonetheless there is no evidence that the existing 1965 rates failed to compensate the railroad for the cost of

¶3 continued

freight operations on the Bethpage tracks, including maintenance of the switch connection. Similarly, there is no reason to believe that the present line-haul rates inadequately compensate the railroad for its entire Bethpage operation, switch connection maintenance included.

¶4 According to Joseph Remington, a transportation consultant who performed a cost analysis of General Motors' rail traffic from various origins to Bethpage, Long Island:

> [t]he traffic from Michigan and Ohio origins does produce a contribution for the railroads both in a variable cost basis and on a fully allocated cost basis. When the 38 shipments as a whole are considered, the deficits produced by the Martinsburg [West Virginia] traffic so offsets the contribution from the Michigan and Ohio traffic, that the profitability of the traffic to the railroads becomes extremely marginal at best and when considered in light of the costs of maintaining the switch connection and trackage, the value of the traffic to the railroads and LIRR in particular becomes very questionable.

(Brief for L.I.R.R. Before the I.C.C., Remington Affidavit).

However, despite the doubts of Mr. Remington, his analysis does not specifically suggest that the line haul

rates for the Bethpage plant are inadequate to cover operating expenses, including maintenance of the switch connection. Rather, he relies on the overall deficit of the LIRR's freight operations to establish that the LIRR sustains a substantial loss from the GMC freight. It is difficult, however, to understand the relationship between the railroad's entire freight operations deficit and the question of whether the cost of a single switch connection is adequately compensated by the line haul rates. The mere fact that a railroad suffers serious deficits in its freight operations does not entitle it to additional compensation for a switch connection when it is unable to establish that the cost of the connection is not adequately compensated by existing freight rates.

15 GMC also contends that imposition of a maintenance charge by the LIRR "for a service previously included in the carrier's line haul rates can only be construed as an unlawful rate increase in violation of §§1(6) and §6(1)." (Brief After Trial of Plaintiff, at 2.) Inasmuch as we affirm the ICC's conclusion that the LIRR has been unable to demonstrate in the first instance that its line haul

/5 continued

rates provide inadequate compensation for the cost of the switch connection, there is no need to consider the question of whether imposition of maintenance charges pursuant to 49 U.S.C. §1(9) is subject to the publication requirement of 49 U.S.C. §6(1), which requires that a change in rates must be listed with the ICC and kept open for public inspection. See Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U. S. 800, 93 S.Ct. 2367 (1973).

However, as a practical matter, if the LIRR felt that it was entitled to additional compensation for maintenance costs of any of its numerous switch connections, the simplest approach would be to file a rate increase. The shipper, of course, would then be entitled to challenge the proposed new charge. Under this procedure, the burden of proof, if the proposed rate increase is challenged before it goes into effect, would be on the carrier to show that the proposed rate is just and reasonable. 49 U.S.C. §15(7).

Otherwise, the somewhat unusual and time-consuming procedural posture of this case is likely to be repeated.

/5 continued

Parenthetically, our decision in this case applies only to the adequacy of the LIRR's compensation for the Bethpage switch connection, and in no way precludes the railroad from seeking additional compensation, where justified, for its maintenance of other switch connections.

/6 The plaintiff also argues that requiring the railroad to absorb the cost of the switch connection discriminates against smaller shippers that only use public tracks as well as those private-track users who have already agreed to pay additional charges for their switch connection. Again, we emphasize that our decision does not require the railroad to pay for the maintenance of the switch connection; rather, we find that the LIRR has failed to prove that its line haul rates are inadequate to compensate it for the maintenance costs. This may or may not be the situation with respect to the other private track shippers. As to the public track shippers, it may be true that private sidetrack placement is more expensive than public track. Nonetheless, the public track shippers benefit from the private track shipping through reduced

6/ continued

congestion and inconvenience that would exist on the public tracks if private track shipping were diverted there. For these reasons, we reject the argument that GMC's failure to pay the proposed maintenance fee would involve a violation of the Elkins Act, 49 U.S.C. §41 et seq., which forbids unlawful rebates or concessions.

* * * * * * * * * * *

LETTER, DATED JANUARY 13, 1977, CORRECTING A TYPOGRAPHICAL ERROR.

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January 13, 1977

Mr. Albert H. Fitzgerald
Acting Chairman
Suspension and Fourth Section Board
Room 4332
Interstate Commerce Commission
Washington, D.C. 20423

Re: Long Island Railroad Freight Tariff No. 72 Issued December 14, 1976, Becoming Effective January 15, 1977

Dear Mr. Fitzgerald:

In the verified complaint, protest and petition for suspension to the captioned tariff filed by General Motors Corporation yesterday, there appears at the bottom of page 6 the figures "$25,000 to $30,000." Those figures represent a typographical error and the correct figures should be $2,500 to $3,000. We apologize for this error and any inconvenience we may have caused the Board.

A copy of this letter is being forwarded to the publishing agent for the Long Island Railroad.

Very truly yours,

Richard A. Mehley

RAM:lcq

CC: Mr. J. L. Faraci,
Publishing Agent

REPLY TO COMPLAINT.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

Suspension Board Case No. 66127

Effective Date:	January 31, 1977
Tariff Reference:	LIRR Freight Tariff 72, ICC No. 1119
Commodity:	Charges for Maintenance of Private Siding Switch Connections at Stations on The Long Island Rail Road Company
Origin:	All Origins
Destination:	Stations on the LIRR.

REPLY OF
THE LONG ISLAND RAIL ROAD COMPANY
TO VERIFIED COMPLAINT, PROTEST, AND
PETITION FOR SUSPENSION OF
GENERAL MOTORS CORPORATION

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
Washington, D. C. 20036
Attorneys for The Long Island
Rail Road Company

Dated: January 25, 1977

REPLY TO COMPLAINT
BEFORE THE

INTERSTATE COMMERCE COMMISSION

Suspension Board Case No. 66127

Effective Date:	January 31, 1977
Tariff Reference:	LIRR Freight Tariff 72, ICC No. 1119
Commodity:	Charges for Maintenance of Private Siding Switch Connections at Stations on The Long Island Rail Road Company
Origin:	All Origins
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REPLY OF
THE LONG ISLAND RAIL ROAD COMPANY
TO VERIFIED COMPLAINT, PROTEST, AND
PETITION FOR SUSPENSION OF
GENERAL MOTORS CORPORATION

Comes now The Long Island Rail Road Company ("LIRR") and files this reply to the verified complaint, protest, and petition for suspension filed by General Motors Corporation ("GM"). The involved tariff, LIRR Freight Tariff 72, I.C.C. 1119, was originally published to become effective January 15, 1977, but after GM's late protest was accepted for filing on January 12, 1977, LIRR received Special Permission No. 77-2203 to postpone the effective date of the tariff, on one day's notice, to January 31, 1977.

REPLY TO COMPLAINT

Although there was no established list of subscribers to this tariff at the time it was filed with the Commission, a copy was sent to GM, the only known interested party. The tariff which was sent to GM was mailed to the proper post office box and zip code, but was erroneously addressed to Edgewood, New Jersey, instead of Englewood, New Jersey. Although the envelope containing the tariff was never returned by the post office to LIRR, GM claims it never received it.

LIRR's Notice of Independent Action was reproduced and distributed to the membership of the Traffic Executive Association -- Eastern Railroads on December 15, 1976, and was publicized in the December 24, 1976, issue of the Traffic Bulletin. Inquiries regarding it were received from other shippers as early as December 28, 1976, but the first contact by GM with LIRR regarding this matter was not until January 10, 1977, and its late protest was accepted for filing by the Suspension Board on January 12, 1977, three days before the originally scheduled effective date. When LIRR recently filed a late protest under similar circumstances, the Suspension Board refused to consider it, citing the provisions of Rule 42 and, while the treatment accorded GM and LIRR seems something less than even-handed, LIRR does not object to the consideration of the late-filed protest.

REPLY TO COMPLAINT

I. BACKGROUND

Prior to 1954, LIRR's practice was to require industries to bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on LIRR's property. In November of 1954, that policy changed in order to meet the increasing competition of other modes of transportation and to attract additional industry to Long Island. Under the new policy, the industry paid the cost of constructing that portion of the sidetrack beyond the right-of-way line. Also, the LIRR was responsible for the maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, LIRR returned to its pre-1954 policy which required industries to bear the entire cost of maintaining the private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before GM refused to execute the same type of contract signed by other shippers or receivers.

Litigation before the U. S. District Court for the Eastern District of New York and before the Commission followed. Copies of the report of Division 3 of the Commission and the opinion of the District Court were attached to GM's protest. Upon referral

from the District Court, in its report and order on reconsideration in Docket 35790, General Motors Corp., Long I. R. Priv. Sidetrack, 351 I.C.C. 691, 699, the Commission's Division 3 found that, on the record made, LIRR could not lawfully impose the proposed maintenance charge on GM. Division 3 made it clear, however (at pp. 698-699):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."

As shown in the attached verified statements of L. E. Peabody, Jr., and Charles H. Gaut, the existing level of line-haul rates to GM's plant at Bethpage, N. Y., is reasonable -- and, in fact, is extremely low -- and will continue to be so, despite the additional charge for maintenance, and the proposed separate maintenance charge is reasonable, nondiscriminatory, nonpreferential and nonprejudicial.

LIRR would prefer its normal method of entering into contractual arrangements with shippers and receivers for the maintenance of switch connections under Section 1(9), but is bowing

to the Commission's ruling in publishing the per-car maintenance charge at GM's Bethpage plant.*/ The tariff makes it clear that such a per-car charge will be published only "where no contractual arrangement exists for the maintenance of switch connection to such private siding." In affirming the Commission's decision, the District Court made it clear that its decision applied only to the Bethpage switch connection (footnote 5), and LIRR intends to continue to be reimbursed for maintenance of other switch connections by contractual arrangements, with separate tariff charges to be published only where a shipper or receiver, like GM, refuses to enter into such contractual arrangements.

II. THE PROPOSED MAINTENANCE CHARGE IS CLEARLY JUST AND REASONABLE, NONPREJUDICIAL AND NONPREFERENTIAL.

In its protest, GM inadvertently conclusively proves the reasonableness of the proposed separate maintenance charge of $4.39 per car. GM points out that the average annual maintenance cost of GM's Bethpage switch connection was previously estimated at $3,266.80, and states that it has 500 to 650 cars delivered

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*/ Subsequent to its decision in the General Motors case, Division 3 made it clear in Docket No. 36163, Allied Container Corporation v. Maine Central Railroad Company, decided October 27, 1976, that a railroad has a right to reasonable compensation for the cost of maintaining a switch connection and that the practice of charging patrons separately may be a reasonable method of compensation under Section 1(9).

per year at Bethpage, so that the "proposed increase would result in an increase in General Motors rail costs on Bethpage traffic of from $25,000 to $30,000 per annum."*/ (p. 6) In 1975, GM received 550 cars by rail at Bethpage which, at $4.39 per car, would have resulted in total maintenance charges of $2,414.50, far less than the estimated annual cost shown in the proceedings before the Commission in Docket No. 35790. As shown in the accompanying Verified Statement of Charles H. Gaut, the average annual cost is now estimated at about $1,806.00, which is just about the amount GM would pay at $4.39 per car for the estimated 1976 total of 412 cars. (The actual total for 11 months was 378 cars.)

The proposed maintenance charge would also clearly be nondiscriminatory, nonprejudicial and nonpreferential and, in fact, would result in removing the present undue preference which LIRR is forced to give to GM because of the decision of Division 3. After LIRR's old policy was reestablished in 1970, GM was the 170th shipper or receiver to whom LIRR's standard sidetrack agreement was presented and the first to refuse to sign. Such contractual arrangements were approved by the Commission in the Allied Container case as a proper method of the carrier's securing compensation to offset the maintenance costs under the provisions of Section 1(9), and the District Court made it clear that its decision was confined to the GM situation. The tariff specific-

*/ GM recognized the error after the protest was filed and so notified the Suspension Board by letter.

ally provides that the per-car maintenance charge will apply only where no contractual arrangement exists. Thus, the per-car charge at Bethpage is necessary to remove the present unlawful preference in favor of GM. It might be pointed out that if LIRR voluntarily gave GM the "free ride" which it seeks, it would probably be taken into Court by the Commission for violation of the Elkins Act. To the extent that GM's per-car maintenance charge does not cover the full maintenance costs paid by other shippers and receivers, GM will still be getting some preferential treatment, but this is the best LIRR can do and still comply with the decisions of the Commission and the District Court.

III. DESPITE THE ADDITIONAL CHARGE FOR MAINTENANCE, THE EXISTING LEVEL OF RATES WILL BE REASONABLE AND, IN FACT, WILL CONTINUE TO BE UNDULY LOW.

The proposed maintenance charge also clearly meets the other part of the test quoted above which was laid down by Division 3 in Docket No. 35790, namely, that it must be shown the "existing level of line-haul rates is reasonable, despite the additional charge for maintenance." The involved GM traffic moving to Bethpage is among the most unprofitable handled by LIRR and, based on available 1975 average figures, LIRR would need an additional $356.00 per car, instead of the $4.39 it seeks, to break even on GM's Bethpage traffic.

REPLY TO COMPLAINT

LIRR's QCS reports for 1975 filed with the Commission show that it handled a total of 55,208 cars of freight. Its Annual Report for 1975 shows that LIRR had total freight expenses of $29,727,000, so that it cost LIRR an average of about $538 to handle each car of freight. A compilation was made of 51 receivers whose traffic produced more than $50,000 in freight revenues for LIRR in 1975. GM's traffic at Bethpage ranked 49th, third from the bottom, with average revenue per car of $181.27. Thus, based on the average figures, in order to break even on GM's traffic at Bethpage, LIRR would have needed additional revenues of more than $356.00 for every car delivered, instead of the $4.39 which it now seeks. Put another way, GM is now paying only about one-third of the cost of handling the average car on LIRR. As is so often the case, the one paying the least is the one seeking a "free ride."

Although the average revenue and cost figures mentioned above would appear to be sufficient to show that the level of rates, despite the added maintenance charge, would be reasonable (if not too low), the accompanying verified statement of Leroy E. Peabody, Jr., presents revenue-cost comparisons of the specific GM Bethpage traffic which prove this beyond a shadow of a doubt. As Mr. Peabody shows, the total revenues produced by the traffic fail to cover the variable costs of the entire movement, and the revenues received by LIRR from its divisions and from its terminal surcharge fall far short of covering its variable costs of handling the traffic.

REPLY TO COMPLAINT

IV. THE PROTEST FAILS TO SET FORTH ANY GROUNDS WHICH WOULD WARRANT SUSPENSION AND/OR INVESTIGATION OF THE PROPOSED MAINTENANCE CHARGE.

GM fails to state any valid grounds for suspension or investigation of the tariff.

At page 2, GM states that "the charge applies only to General Motors." This is, of courts, true, because the decisions of the Commission and the District Court are limited to GM's plant at Bethpage. If other receivers seek to get the same preference GM is now receiving and refuse to sign the LIRR's usual sidetrack agreements to enable LIRR to receive compensation to offset the costs of maintaining switch connections, other stations will, of course, be added in future tariff supplements.

At page 3, GM refers to the decision of Division 3 in General Motors Corp., Long I. Priv. Sidetrack, 351 I.C.C. 691, and states that "the Commission's decision specifically prohibits imposition of the proposed surcharge or per car charge." Actually, the Commission's decision made it clear that LIRR could impose such a charge if it made the showing necessary to pass the tests quoted above. (pp. 698-699) As shown above and in the accompanying verified statements, LIRR clearly meets the required tests.

At pages 3-4, GM contends at length that "no copy of the tariff provision was served upon complainant" and that "no copy

of the tariff was in fact received by General Motors." This matter is discussed above at page 2 of this Reply. GM does not explain how, if it did not in fact ever receive a copy of the tariff, it became familiar with all of its provisions.

At page 5, GM states: "No other shippers with private side tracks are affected by the instant charge, making it prima facie discriminatory against, and prejudicial to, complainant." On the contrary, as discussed hereinabove at pages 6-7, the proposed charge is necessary to eliminate the possibility of unlawfully preferring GM.

At page 5, GM also claims that the instant proposal constitutes a collateral attack upon the Commission's decision. The District Court decision, which affirmed that of Division 3, is being appealed to the United States Court of Appeals for the Second Circuit. In the meantime, LIRR is trying to eliminate the present undue preference of GM by receiving the compensation to which it is entitled by means of a published tariff charge, as suggested by counsel for the Commission at the hearing before the District Court. While quoting from the decision of Division 3 (at pp. 5-6), GM carefully refrains from citing the language quoted hereinabove which states that a separate maintenance charge may be published where, as here, certain tests are met.

REPLY TO COMPLAINT

At page 6, GM states that "about 90 percent of this traffic moves via the Long Island Railroad, so that that carrier has market dominance on the movement of this traffic." No facts or figures are given in support of this bald statement, and LIRR has no way of checking its accuracy. However, even if it were shown that LIRR has market dominance, the proposed maintenance charge has clearly been shown to be just and reasonable.

The rest of the protest (pp. 6-7) is devoted to argument based on the erroneous mathematical computations discussed above and a request that the Commission suspend and investigate on its own motion if GM's protest were not accepted for filing.

From all of the above, it is obvious that GM's protest is completely without merit. The Suspension Board should clearly decide not to suspend or investigate the proposed tariff and should permit it to become effective as scheduled.

Respectfully submitted,

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
Washington, D. C. 20036

Attorneys for The Long
Island Rail Road Company

REPLY TO COMPLAINT

VERIFICATION

State of New York

County of Queens,

J. L. Faraci, being duly sworn, deposes and says that he is Manager - Pricing and Divisions for The Long Island Rail Road Company; that his responsibilities include analysis of rate proposals, publication of rates, interpretation of tariffs and negotiation of divisions; that he is familiar with the facts set forth in the foregoing reply to protest; and that the facts and allegations set forth herein are true and correct.

_____

Subscribed and sworn to before me this

21st day of January, 1977.

_____

PETITION FOR RECONSIDERATION.

Before The

INTERSTATE COMMERCE COMMISSION

Washington, D.C.

Suspension Board Case No. 66127

Investigation Docket No. 36516

PETITION TO DIVISION 2 REQUESTING RECONSIDERATION OF SUSPENSION BOARD'S REFUSAL TO SUSPEND LONG ISLAND RAIL ROAD COMPANY FREIGHT TARIFF 72, I.C.C. 119, EFFECTIVE JANUARY 15, 1977

Submitted By:

GENERAL MOTORS CORPORATION

Protestant

By: Benson T. Buck

Francis W. McInerny
John Guandolo
Richard A. Mehley

Its Attorneys

OF COUNSEL:

MACDONALD & McINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036

Dated: January 27, 1977

PETITION FOR RECONSIDERATION

Before The

INTERSTATE COMMERCE COMMISSION

Washington, D.C.

Suspension Board Case No. 66127

Investigation Docket No. 36516

PETITION TO DIVISION 2 REQUESTING RECONSIDERATION OF SUSPENSION BOARD'S REFUSAL TO SUSPEND LONG ISLAND RAIL ROAD COMPANY FREIGHT TARIFF 72, I.C.C. 1119, EFFECTIVE JANUARY 15, 1977

This Matter Requires Expedited Handling.

Comes now General Motors Corporation and respectfully submits this petition to Division 2 requesting that it suspend the captioned tariff published by the Long Island Rail Road (LIRR). The Suspension and Fourth Section Board voted on January 26, 1977 to investigate but not to suspend the above tariff. While the vote to investigate is correct, petitioner submits that the Suspension Board erred in failing to suspend this tariff and urges that the Division reconsider and suspend for the following reasons:

PETITION FOR RECONSIDERATION

No Showing That Proposed Switch Maintenance Charge Is Just And Reasonable

This tariff involves a per car charge for "maintenance of private siding switch connections" which is applicable only to General Motors at Bethpage, New York. As previously indicated, the LIRR attempted to impose such a charge by means of a contract, which General Motors refused to sign. That matter was submitted to the Commission, and Division 3, in General Motors Corp., Long I. Priv. Sidetrack, 351 M.C.C. 69, found such proposal to be unjust, unreasonable and unduly prejudicial to, and discriminatory against, General Motors. The Division concluded that the LIRR had "not established that the line haul rates do not fully compensate it for the maintenance of a switch connection" (351 I.C.C. at 697). The LIRR now attempts to do through tariff form what the Commission precluded it from doing by contract. This tariff not only constitutes a collaterial attack upon that decision but would result in a double payment by General Motors for the same service.

As the Commission noted in the General Motors decision, supra, the maintenance costs for this particular switch are chargeable to operating expenses and are therefore "a part of" the rate base. General Motors not only pays the line haul rate for the movement of its cars from the Michigan origins to Bethpage but also must pay the LIRR's surcharge.

These two charges constitute the rate base, and the switch maintenance costs are included in that rate base. The Commission not only found the proposed charge unjust and unreasonable but stated, as respondent indicates, that such a charge could be imposed only where there is a reduction in the line haul rate or where the existing line haul rates plus the additional maintenance or switching charge would be just and reasonable and not discriminatory or prejudicial. It must be assumed that the Board was influenced in arriving at its decision by the incorrect and uncalled for reliance by respondent in its reply (p. 5) on the decision and order of Division 3 in Docket No. 36143, Allied Container Corporation v. Maine Central Railroad Company, served November 2, 1976. In its reply, respondent implied that the decision in the General Motors case was reversed in Allied Container. A reading of the decision and order in the Allied Container case shows that the defendant railroad there, as opposed to respondent herein, had "never absorbed into its line-haul rates the construction and maintenance costs of switch connection facilities to private sidetracks." Division 3 held in the Allied Container case that "in light of defendant's long-standing and uniformly applied practice of separately charging its patrons and never absorbing such costs, defendant's compensation is reasonable under section 1(9)."

There has been no such showing here, and respondent's assertions that General Motors is presently being preferred or receiving some sort of a benefit is wholly without foundation. Moreover, it is clear from the statistics submitted by LIRR that such a charge is wholly unjust and unreasonable.

Comparative Statistics Indicate LIRR More Than Compensated For Switch Maintenance

It should be noted that the LIRR is the sole rail carrier operating to and from Bethpage, and that, since 90 percent of General Motors' traffic to Bethpage moves via that carrier, it completely dominates the rail transportation at that point. It attempts to abuse that market dominance through imposition of the proposed maintenance charge. While LIRR submits a purported cost study attempting to demonstrate the justness and reasonableness of its proposed charge, it fails to do so.* The Commission has generally condemend the practice of imposing surcharges or special charges for each segment of a transportation movement, Surcharges, New York State, 62 M.C.C. 117, 133, and this is particularly so where such carrier has for years included said service as part of the line-haul rate. Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800.

In fact, the statistics recited in that study clearly indicate the unjust and unreasonable nature of any additional

* In fairness, the cost for the thru movement should not have been used. Only Long Island's costs should have been used.

charge for the movement involved. Analysis of the revenue received by LIRR in comparison with the other railroads participating in this movement indicates that LIRR receives 36.7 percent of the total revenue for the entire movement, despite the fact that it handles the traffic for only 4.4 percent of the total miles involved. In addition, the per car revenue received by LIRR is greater than that received by any of the other participating railroads. For example, LIRR receives $238.47 per car for moving said traffic 32.6 miles, whereas the Grand Trunk Western (GTW) receives only $60.60 per car for moving said traffic 63 miles. Further, a comparison of the revenue per car mile clearly points up the unreasonableness of any addition charge by the LIRR. LIRR receives $7.21 per car mile for moving General Motors traffic, whereas Penn Central/ConRail receives 51¢ per car mile, the Canadian National, 63¢ per car mile, and the Grand Trunk Western, 91¢ per car mile. Comparative analysis of the Long Island revenue from operations with those of the participating railroads is set forth in the appendix attached hereto.

It is difficult to fathom just how the Long Island's cost for handling this traffic could be so disproportionate to that of its brother railroads, even allowing for the relatively short operations of the LIRR. It is possible that LIRR's freight operations are helping to subsidize its extensive passenger operations, a practice the Commission

has condemned. See Rules Governing Assembling and Presenting Cost Evidence, 337 I.C.C. 298, 308, 326. The foregoing facts clearly mandate that the involved tariff should be suspended and investigated before the LIRR is permitted to impose any additional charge on shippers utilizing its service. Indeed, LIRR already has a 12.5 percent surcharge due to become effective on September 12, 1977.

Failure To Suspend This Tariff Would Create An Unhealthy Precedent That Would Adversely Affect Petitioner

Petitioner has numerous sidetracks throughout the country, and if LIRR is successful in having this tariff become effective other railroads will seize upon such action as justification for imposing switch maintenance charges upon petitioner and no doubt other shippers as well. Such precedent-setting filing should not be permitted to become effective until there has been a thorough investigation of the proposed charge and respondent has clearly demonstrated that such charges would not be unjust and unreasonable or otherwise discriminatory and prejudicial.

For the reasons set forth above, petitioner urges the Division to suspend the involved tariff and set the matter

PETITION FOR RECONSIDERATION

for investigation.

Respectfully submitted,

GENERAL MOTORS CORPORATION

By: _____
Francis W. McInerny
John Guandolo
Richard A. Mehley
Benson T. Buck
Its Attorneys

OF COUNSEL:

MACDONALD & McINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036

Dated: January 27, 1977

PETITION FOR RECONSIDERATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been this day served by messenger upon applicant's Washington representative, Walter J. Myskowski, Esquire, and that a copy has been served upon applicant's New York counsel by first-class mail, postage prepaid.

Dated at Washington, D.C., this 27th day of January, 1977.

Richard A. Mehley

COMPARATIVE ANALYSIS OF REVENUE AND MILES OPERATED*

Railroad	Revenue (40 cars)	Percent Of Total Revenue	Total Miles Operated (Per Car)	Percent Of Total Miles	Revenue Per Car
GTW	$ 2,425	9.3	63	8.7%	$ 60.60
CN	4,784	18.4	189	25.9%	119.60
PC/ConRail	9,112	35.6	446	61.0%	227.80
LIRR	9,539	36.7	32.6	4.4%	238.47
TOTAL	$25,860	100%	730.6	100%	

* The mileage and revenue figures are taken from pages 3 and 5 of the Verified Statement submitte Leroy E. Peabody, Jr. on behalf of the LIRR.

ORDER OF THE INTERSTATE COMMERCE COMMISSION,
FILED JANUARY 28, 1977.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Suspension and Fourth Section Board, held at its office in Washington, D. C., on the 26th day of January, 1977.

No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAIL ROAD

There being under consideration, the matter of rates, charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce in connection with the maintenance of private siding switch connections at the General Motor Corporation plant at Bethpage, N.Y., on the Long Island Rail Road Company, as set forth in the following:

THE LONG ISLAND RAIL ROAD COMPANY,
TARIFF 72, I.C.C. 1119;

or as same may be amended or reissued:

It appearing, That upon consideration of the said tariff schedules, and protest thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules, regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby instituted into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the respondent herein be, and it is hereby, required to keep account of all amounts received, specifying by whom and in whose behalf the amounts resulting from the rates, charges, rules, regulations and practices contained in the schedules subject to this investigation were paid, pursuant to section 15(8)(e) of the Interstate Commerce Act, as amended by section 202(e)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976.

And it is further ordered, That the carrier party to the schedules named herein, be, and it is hereby, made respondent to this proceeding; that a copy of this order be served upon said respondent; and that a notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission.

By the Commission, Suspension and Fourth Section Board, Members Fitzgerald and Halvarson.

(SEAL)

ROBERT L. OSWALD
Secretary

Revenue Per Car Mile

$ .91

.63

.51

7.21

PETITION FOR RECONSIDERATION

ed by

ORDER OF THE INTERSTATE COMMERCE COMMISSION,
FILED JANUARY 31, 1977.

ORDER

INTERSTATE COMMERCE COMMISSION

No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.,
LONG ISLAND RAIL ROAD
IN THE MATTER OF DIRECTING MODIFIED PROCEDURE IN THIS PROCEEDING

PRESENT: A. Daniel O'Neal, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

It is ordered, That this proceeding be handled under modified procedure; the filing and service of pleadings to be as follows: (a) opening statement of facts and argument by respondent(s) and any parties supporting respondent(s) on or before 20 days from the service date of this order; (b) 30 days after that date, statement of facts and argument by protestant(s) and any supporting parties; and (c) reply by respondent(s) and any supporting parties 20 days thereafter.

And it is further ordered, That protestant(s) shall timely advise respondent(s) and this Commission of the identity, including addresses, of the individuals composing the protestant's(s') defense committee, if any, together with an indication of the number of copies of respondent's(s') statement which are desired, and to whom the copies are to be sent.

Dated at Washington, D. C., this 28th day of January, 19 77.

By the Commission, Commissioner O'Neal.

ROBERT L. OSWALD
Secretary

(SEAL)

REPRESENTATIVES OF THE PARTIES

Richard A. Mehley, Esq. (Protestant)
MacDonald & McInerny
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Washington, DC 20036
(Attorney for General Motors Corporation)

Walter J. Myskowski, Esq. (Respondent)
706 Ring Bldg., 1200 - 18th St., N. W.
Washington, DC 20036
(Attorney for The Long Island Rail Road Company)

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.,

LONG ISLAND RAIL ROAD

OPENING STATEMENT OF FACTS AND ARGUMENT ON BEHALF OF RESPONDENT, THE LONG ISLAND RAIL ROAD COMPANY

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
Washington, D. C. 20036
Attorneys for The Long Island
Rail Road Company

Due Date: February 22, 1977

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.,

LONG ISLAND RAIL ROAD

OPENING STATEMENT OF FACTS AND ARGUMENT
ON BEHALF OF RESPONDENT,
THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF FACTS

The involved tariff, LIRR Freight Tariff 72, I.C.C. 1119, was originally published by The Long Island Rail Road Company ("LIRR") to become effective January 15, 1977, but after a late protest was filed by General Motors Corporation ("GM") on January 12, 1977, LIRR received Special Permission No. 77-2203 to postpone the effective date of the tariff, on one day's notice, to January 31, 1977.

By order dated January 26 and served January 28, 1977, the Commission's Suspension and Fourth Section Board declined to suspend the tariff, but ordered the institution of the instant investigation. A petition for reconsideration filed by GM was denied by Division 2 on January 28, 1977. By order dated January

28 and served January 31, 1977 Commissioner O'Neal ordered that this matter be handled under modified procedure.

As stated in the accompanying Verified Statement of James L. Faraci, LIRR's Manager -- Pricing and Divisions, prior to 1954, LIRR's practice was to require industries to bear the entire cost of maintaining private sidings and switch connections. That policy was changed in 1954 in order to meet competition and to attract additional industry to Long Island. Under the new policy, the industry paid the cost of constructing that portion of the sidetrack beyond the right-of-way line. Also, the LIRR was responsible for the maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, LIRR returned to its previous policy which required industries to bear the entire cost of maintaining the private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before GM refused to execute the same type of contract signed by other shippers or receivers.

Litigation then ensued before the U. S. District Court for the Eastern District of New York and before the Commission. Upon referral from the District Court, in its report and order on reconsideration in Docket 35790, General Motors Corp., Long I. R.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

Priv. Sidetrack, 351 I.C.C. 691, 699, the Commission's Division 3 ruled that, on the evidence of record, LIRR could not impose the proposed maintenance charge on GM. Division 3 emphasized, however (at pp. 698-699):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."

Subsequently, after the filing of briefs and hearing oral argument, the United States District Court for the Eastern District of New York, based upon the above quoted language of the Commission, issued a permanent injunction against the LIRR restraining it from ceasing service at GM's Bethpage siding because of GM's refusal to execute LIRR's standard sidetrack agreement. An appeal was taken by LIRR to the United States Court of Appeals for the Second Circuit, the prosecution of which appeal was then deferred indefinitely by the Court on the application of the LIRR pending the outcome of the instant investigation.

ARGUMENT

The attached verified statements of James L. Faraci, Leroy E. Peabody, Jr., Charles W. Powers, and Charles H. Gaut show that

the existing level of line-haul rates to GM's plant at Bethpage, N.Y., is reasonable -- and, in fact, is extremely low -- and will continue to be so, despite the additional charge for maintenance, and that the proposed separate maintenance charge is reasonable, nondistriminatory, nonpreferential and nonprejudicial.

As Mr. Faraci states, LIRR would prefer its normal method of entering into contractual arrangements with shippers and receivers for the maintenance of switch connections under Section 1(9), but is bowing to the Commission's ruling in publishing the per-car maintenance charge at GM's Bethpage plant. (Subsequent to its decision in the General Motors case, Division 3 made it clear in Docket No. 36163, Allied Container Corporation v. Maine Central Railroad Company, decided October 27, 1976, that a railroad has a right to reasonable compensation for the cost of maintaining a switch connection and that the practice of charging patrons separately may be a reasonable method of compensation under Section 1(9).) The LIRR tariff makes it clear that the per-car charge will be published only "where no contractual arrangement exists for the maintenance of switch connection to such private siding." In affirming the Commission's decision, Judge Mishler made it clear that his decision applied only to the Bethpage switch

connection, and LIRR intends to continue to be reimbursed for maintenance of other switch connections by contractual arrangements, with separate tariff charges to be published only where a shipper or receiver, like GM, refuses to enter into such contractual arrangements.

I. THE PROPOSED MAINTENANCE CHARGE IS CLEARLY JUST AND REASONABLE, NONPREJUDICIAL AND NONPREFERENTIAL.

In 1976, GM received 403 cars by rail at Bethpage which, at $4.39 per car, would have resulted in total maintenance charges of $1,887.70, far less than the estimated annual cost shown in the proceedings before the Commission in Docket No. 35790. As shown in the accompanying Verified Statement of Charles H. Gaut, the average annual cost is now estimated at about $1,806.00, which is just about the amount GM would pay at $4.39 per car for the 1976 total of 403 cars.

The proposed maintenance charge would also clearly be nondiscriminatory, nonprejudicial and nonpreferential and, in fact, would result in removing the present undue preference which LIRR is forced to give to GM because of the decision of Division 3. After LIRR's old policy was reestablished in 1970, GM was the 170th shipper or receiver to whom LIRR's standard sidetrack agreement was presented and the first to refuse to sign. Such contractual arrangements were approved by the Commission in the

Allied Container case as a proper method of the carrier's securing compensation to offset the maintenance costs under the provisions of Section 1(9), and the District Court made it clear that its decision was confined to the GM situation. The tariff specifically provides that the per-car maintenance charge will apply only where no contractual arrangement exists. Thus, the per-car charge at Bethpage is necessary to remove the present unlawful preference in favor of GM. It might be pointed out that if LIRR voluntarily gave GM the "free ride" which it seeks, it would probably be taken into Court by the Commission for violation of the Elkins Act.

II. DESPITE THE ADDITIONAL CHARGE FOR MAINTENANCE, THE EXISTING LEVEL OF RATES WILL BE REASONABLE AND, IN FACT, WILL CONTINUE TO BE UNDULY LOW.

The proposed maintenance charge also clearly meets the other part of the test quoted above which was laid down by Division 3 in Docket No. 35790, namely, that it must be shown the "existing level of line-haul rates is reasonable, despite the additional charge for maintenance." As stated by Mr. Faraci, the involved GM traffic moving to Bethpage is among the most unprofitable handled by LIRR and, based on available figures, LIRR would need an additional $315 per car, instead of the $4.39 it seeks, to break even on GM's Bethpage traffic.

LIRR's QCS reports for 1975 filed with the Commission show that it handled a total of 55,208 cars of freight. Its Annual Report for 1975 shows that LIRR had total freight expenses of $29,727,000, so that it cost LIRR an average of about $538 to handle each car of freight. As pointed out by Mr. Peabody, GM's traffic at Bethpage produced average revenue per car of $223. Thus, based on the average figures, in order to break even on GM's traffic at Bethpage, LIRR would have needed additional revenues of $315 for every car delivered, instead of the $4.39 which it now seeks.

Although the average revenue and cost figures mentioned above would appear to be sufficient to show that the level of rates, despite the added maintenance charge, would be reasonable (if not too low), the accompanying Verified Statement of Leroy E. Peabody, Jr. (p. 14) presents revenue-cost comparisons of the specific GM Bethpage traffic which prove this beyond a shadow of a doubt. As Mr. Peabody shows, the total revenues produced by the traffic cover only 59% of the variable costs of the entire movement, and the revenues received by LIRR from its divisions and from its terminal surcharge cover only 54% of its variable costs of handling the traffic. (In this connection, it should be noted that the terminal surcharge was specifically authorized as a pass-through to recoup additional railroad retirement taxes ans is not considered a part of the line-haul charge even though computed and assessed on the total line-haul charge.)

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
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IV. CONCLUSION

For the reasons set forth above, the Commission should find the switch connection maintenance charge is just and reasonable, nondiscriminatory, nonprejudicial, and otherwise lawful in all respects, and the investigation should be discontinued.

Respectfully submitted.

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
Washington, D. C. 20036

Attorneys for The Long
Island Rail Road Company

Due date: February 22, 1977

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opening Statement of Facts and Argument and accompanying Verified Statements have this day been served, by first class mail, postage prepaid, upon counsel for General Motors Corporation.

Dated at Washington, D. C., this 16th day of February, 1977.

WALTER J. MYSKOWSKI

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.

THE LONG ISLAND RAIL ROAD

VERIFIED STATEMENT
OF
LEROY E. PEABODY, JR.

On Behalf of

The Long Island Rail Road Company

Due Date: February 22, 1977

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
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My name is Leroy E. Peabody, Jr. I am President of L. E. Peabody & Associates, Inc., Economic Consultants. My business address is The Weber Building (Suite 303), 9420 Annapolis Road, Lanham, Maryland 20801. My qualifications are contained in Appendix A.

I. INTRODUCTION

On December 14, 1976 The Long Island Rail Road Company (LIRR) issued Freight Tariff 72, I.C.C. 1119 which provides for the publication of charges for maintenance of private siding switch connections at Bethpage, New York to become effective January 15, 1977. The tariff was protested by affected parties and under Special Permission No. 77-2203 LIRR extended the effective date to January 31, 1977.

The Interstate Commerce Commission (ICC), in an order dated January 26, 1977 which was served on January 28, 1977, instituted an investigation concerning the lawfulness of the rates, Docket No. 36516. Under service date of January 31, 1977, the ICC issued an order in Docket No. 36516 which established modified procedure for the introduction of evidence.

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I have been retained by LIRR to study the traffic moving to General Motors Corporation (GM) at Bethpage, New York in order to determine its profitability. I was requested to compare the revenues received by the involved carriers with the costs incurred by the railroads handling the traffic. My analyses provide the margin of profitability separately for LIRR, other line-haul carriers, and all involved carriers combined.

The balance of my testimony is organized as follows:

- ¶ Traffic, Revenue and Operating Analyses
- ¶ Costing Procedures
- ¶ Summary and Conclusions

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II. TRAFFIC, REVENUE AND OPERATING ANALYSES

In preparation for my study, I requested the LIRR Manager of Revenue Accounting to establish the universe of GM traffic for the calendar year 1976. Interline abstracts, documents used by the railroads to record and distribute revenues among the involved carriers, were used for this purpose. They provide basic traffic, revenue and operating characteristics of the commodity identified on the abstract.

There were a total of 403 carloads destined to GM at Bethpage during the calendar year 1976. The universe of traffic was sampled by identifying 40 random sample carloads from this universe (a ten percent sample). Data abstracted for each sample carload and summarized for purposes of my analyses include:

1. Abstract Identification No.
2. Account Date
3. Route of Movement
4. Revenues by Railroad
5. Commodity
6. Car Initial and No.
7. Weight Paid For
8. Weight Shipped
9. Origin Station and State

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ROUTE OF MOVEMENT

Seven basic routes were involved in the movement of the sample traffic to GM at Bethpage, New York. A summary is shown in Table 1 below:

Table 1 - Route of Movement Summary of Sample GM Traffic Destined to Bethpage, New York

Route No. (1)	Origin (2)	Carloads (3)	Route and Miles (4)
1	Martinsburg, W. Va.	26	ConRail[1/3] (557) - FP[2] - LIRR (33)
2	Pontiac, Mich.	5	GTW (56) - Port Huron - CN (189) - Buffalo - ConRail[1] (446) - FP[2] - LIRR (33)
3	Waterford, Mich.	3	GTW (63) - Port Huron - CN (189) - Buffalo - ConRail[1] (446) - FP[2] - LIRR (33)
4	Flint, Mich.	2	GTW (63) - Port Huron - CN (189) - Buffalo - ConRail[1] (446) - FP[2] - LIRR (33)
5	Olney Station, Pa.	2	ConRail[1/3] (385) - FP[2] - LIRR (33)
6	Olney, Pa.	1	Reading (18) - Belmont - ConRail[1/3] (367) - FP[2] - LIRR (33)
7	South Bend, Ind.	1	NJII (11) - Pine - N&W (420) - Buffalo - ConRail[1] (446) - FP[2] - LIRR (33)
	Total	40	

1/ Identified as Penn Central or Erie Lackawanna prior to April 1, 1976.

2/ Fresh Pond Jct.

3/ Via Selkirk.

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Two to four carriers were involved in each of the seven routes in the sample.

LIRR

Details were obtained for operations over the LIRR from Fresh Pond to Bethpage. These data are shown in Table 2 below:

Table 2 - LIRR Route of Movement for All Routes

Item (1)	Train Ref. (2)	Miles (3)	Power (4)	Trailing Weight (5)
Loaded Direction				
1. Fresh Pond-Holban (Hillside Yard)	RF 16	7	4 units	5,600
2. Holban-Wellwood	RF 80	21.3	1 unit	500
3. Wellwood-Bethpage	RF 64	4.3	1 unit	561
4. Weighted Average[1/]		xxx	1.64	1,603
Empty Direction				
5. Bethpage-Wellwood	RF 64	4.3	1 unit	561
6. Wellwood-Holban	RF 81	21.3	1 unit	301
7. Holban (Hillside Yard)-Fresh Pond	RF 11	7	2 units	810
8. Weighted Average[1/]		xxx	1.21	445
9. Average Round Trip[2/]		xxx	1.42	1,024

1/ Weighted on miles in Col. (3).

2/ Simple average of loaded and empty direction.

Loaded cars received from ConRail at Fresh Pond are moved in LIRR RF 16 to Hillside Yard at Holban, a distance of 7 miles. These trains are broken up, classified, and assembled for further movement east in RF 80 to Wellwood, a distance of 21.3 miles. At

Wellwood the cars are set out for westbound RF 64 which places the cars at General Motors at Bethpage, a distance of 4.3 miles. The empty movement is in the reverse direction. Empties are picked up at Bethpage by RF 64, moved to Wellwood where they are set out for RF 81 for movement westbound to Holban for classification, and movement by RF 11 to Fresh Pond for interchange with ConRail. The total distance is 32.6 miles in each direction .

REVENUES

Line-haul revenues separately by railroad and LIRR surcharges were recorded for each of the 40 sample movements. A summary of revenue data is shown in Table 3 below:

Table 3 - Summary of Revenues of Involved Traffic

Route No. (1)	Railroads Other Than LIRR		LIRR		Total	
	Aggregate (2)	Per Carload (3)	Aggregate (4)	Per Carload (5)	Aggregate (6)	Per Carload (7)
1	$ 5,911	$ 227	$ 5,610	$ 216	$11,521	$ 443
2	2,166	433	1,228	246	3,394	679
3	1,480	480	804	268	2,244	748
4	918	459	499	250	1,417	709
5	232	116	378	189	610	305
6	89	89	145	145	234	234
7	379	379	204	204	583	583

Total revenues for carriers other than the LIRR amounted to $11,135 or $278 per carload for all seven routes combined. LIRR revenues aggregated $8,868 or $222 per carload.

TRAFFIC AND OPERATING CHARACTERISTICS

Traffic and operating characteristics of the involved traffic are discussed under the following topics:

1. Equipment
2. Car Cycle

Equipment

The car initial and number shown on the interline abstract were used to identify the type of equipment. All involved cars were box, general service, equipped for the movement of auto parts. The weight paid for recorded on the abstract was used for the purpose of determining revenues. The actual weight shipped was used for the purpose of determining costs. The average loadings for the seven routes are shown below:

Origin (1)	Average Loading per Car (2)
1. Martinsburg, West Va.	7.42 tons
2. Pontiac, Michigan	7.54 tons
3. Waterford, Michigan	5.01 tons
4. Flint, Michigan	6.10 tons
5. Olney Station, Pa.	6.55 tons
6. Olney, Pa.	6.38 tons
7. South Bend, Indiana	5.63 tons
8. Average	7.07 tons

The average tare weight for this type of equipment of 36 tons was taken from the Interstate Commerce Commission's Cost Scales[1/].

Car Cycle

As LIRR does not own freight cars, all car costs are attributable to per diem and mileage rates paid to the owning carriers. For this purpose the on-line date, off-line date and mileage for which payment is made were developed for each of the 40 cars from LIRR car records. Results of that analysis are summarized in Table 4 below:

1/ ICC, Bureau of Accounts, Rail Carload Cost Scales, 1974 Statement No. 1CJ-74.

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Table 4 - LIRR Car Costs

Origin (1)	Average per Diem Cost (2)
1. Martinsburg, West Va.	$ 28.89
2. Pontiac, Mich.	38.43
3. Waterford, Mich.	26.53
4. Flint, Mich.	30.71
5. Olney Station, Pa.	25.12
6. Olney, Pa.	41.12
7. South Bend, Indiana	48.11
8. Weighted Average*	30.59

* Weighted on basis of sample cars in route.

The average car incurred per diem and mileage costs of $30.59.

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III. COSTING PROCEDURES

Basic unit costs for application to the traffic and operating characteristics discussed above in Section II were developed by application of Rail Form A, a formula used by the Interstate Commerce Commission to determine costs of providing railroad service for the calendar year 1975, the latest full year available. The expense portion of the unit costs was increased to reflect wage and material price levels as of July 1976. Variable costs for other carriers were based on Official Territory, excluding New England, as published in the ICC 1974 Cost Scales[1/] (latest available) increased to reflect wage and material price levels as of July 1976.

The variable costs incurred by the railroads are separated between terminal, line-haul running and line-haul switching functions. Terminal costs include origin and destination switching, terminal portion of car costs, station billing expenses and miscellaneous other expenses. Line-haul running costs include the power, crews and fuel of the road trains, maintenance of roadway, running portion of car costs and miscellaneous other expenses. Line-haul switching costs include the switching required to interchange traffic between two railroads and classification switching on individual carriers where road trains are classified.

1/ ICC, Bureau of Accounts, Rail Carload Cost Scales, 1974, Statement No. 1C1-74.

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Interchange costs were not included for LIRR or ConRail at Fresh Pond Jct. as the entire train is interchanged between the two carriers with road power. However, the Rail Form A prepared for LIRR counts these cars as interchanged and allocates a portion of switching expenses. To this extent, LIRR switching costs other than interchange are understated.

A summary of variable costs for the involved traffic is shown below:

Table 5 - Summary of Variable Costs per Carload, July 1, 1976

Route No. (1)	Railroads Other Than LIRR (2)	LIRR (3)	Total (4)
1	$389	$411	$ 800
2	584	422	1,006
3	582	405	987
4	584	411	995
5	298	406	704
6	360	423	783
7	676	429	1,105
Weighted Average 1/	$440	$412	$ 852

1/ Weighted on basis of cars in each route - see Table 1 hereinabove.

Variable costs incurred by carriers other than the LIRR amounted to $298 to $676 per carload depending upon the involved route and averaged $440 per carload. LIRR variable costs range from $405 to $429 and averaged $412 per carload. Variable costs for all involved carriers range from $704 to $1,105 and averaged $852 per carload.

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IV. SUMMARY AND CONCLUSIONS

Revenues generated from this traffic are compared with the variable costs incurred by the railroads in Table 6 below:

Table 6 - Relationship of Revenues to Variable Costs

Item (1)	Average Revenue per Carload (2)	Variable Costs per Carload (3)	Ratio of Revenues to Costs (Col. 2 ÷ Col. 3) (4)
1. Carriers other than LIRR	$ 278	$440	63%
2. LIRR	222	412	54%
3. Total	$ 500	$852	59%

Source: Tables 3 and 5 above.

The average revenue for carriers other than LIRR of $278 per carload is only 63 percent of the variable costs of $440 per carload for these carriers. Average revenues of $222 per carload accruing to the LIRR are only 54 percent of the variable costs of $412 incurred by LIRR. In total, the involved traffic average revenue of $500 per carload is but 59 percent of the variable costs of $852 per carload.

Based on the results of my analysis, the revenues generated by the General Motors traffic to Bethpage, New York are woefully inadequate to cover the costs incurred by the carriers in handling the involved traffic whether measured by all carriers combined or the LIRR alone.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
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QUALIFICATIONS

My name is Leroy E. Peabody, Jr. I am President of the firm of L. E. Peabody & Associates, Inc., Economic Consultants. The firm's offices are located in Lanham, Maryland.

I am a graduate of Utah State University with a B.S. degree in commerce and a major in economics. While at Utah State, I also took post-graduate courses in economics.

I have over 20 years of experience in the fields of transportation and marketing economics. I began my career as a fuel economist in the Bureau of Coal Economics, National Coal Association, Washington, D.C. Since 1955 I have been engaged continuously as an economic consultant. For ten years I was associated with Dr. Ford K. Edwards in transportation consulting work as a partner in the firm of Edwards and Peabody of Washington, D.C. Following the retirement of Dr. Edwards in October 1965, the firm name was changed to L. E. Peabody & Associates. The firm was incorporated in 1969.

In the course of my career, I have conducted economic studies for all modes of surface transportation, for shippers of numerous different commodities, for associations, for state and local governments and other public bodies. My transportation studies have treated with marketing, rates, operations and costs. The results of many of these studies have been introduced by me before the Interstate Commerce Commission, state regulatory commissions,

courts and other governmental agencies. On many occasions I have appeared as a witness before these bodies to give oral testimony concerning the studies I have conducted.

Included among the economic studies I have organized and directed are diversion and profitability analyses in connection with railroad mergers, traffic and cost analyses in connection with the division of through rail rates, and various studies concerning multiple car movements, tri-level shipments and unit-train operations. Additionally, I have directed studies treating with market values and the transportation of commodities handled by railroads.

I have also organized, directed and conducted switching and other similar operating studies covering the operations of various railroads throughout the United States. These studies have dealt with most aspects of common carrier operations, including line-haul, terminal, water, passenger and other services.

In the course of my work, I have become familiar with the basis and use of various formulas developed by the Interstate Commerce Commission and employed in the development of variable costs for common carrier services. These formulas develop the cost of providing rail, motor carrier and water carrier services. Included among the rail formulas are Rail Form A which develops variable terminal and line-haul costs for line-haul railroads and Terminal Form F which develops variable terminal costs for terminal operations of both line-haul and switching and terminal railroads.

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In the conduct of my engagements, I have spent considerable time in the operating and accounting departments of numerous railroads and I have become familiar with the operating and accounting methods and procedures used by railroads in the normal course of business.

My experience related to LIRR traffic and operations spans the past 14 years. I have conducted studies of both freight and passenger operations of the LIRR. During the course of these studies, I have had occasion to analyze the freight and passenger lines, yards and stations served by the LIRR. I am familiar with the interchange of traffic at Fresh Pond, switching operations at Holban Yard and the local freight services beyond Holban to points on the LIRR such as Bethpage, New York.

I am a member of the Transportation Research Forum and Transportation Association of America.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

VERIFICATION

STATE OF MARYLAND)
) SS:
COUNTY OF PRINCE GEORGE'S)

LEROY E. PEABODY, JR., being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Leroy E. Peabody, Jr.

Subscribed and sworn to
before me this ___ day
of _____ 197_.

Notary Public
My Commission Expires

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

VERIFIED STATEMENT OF CHARLES W. POWERS

I. Qualifications and Experience

My name is Charles W. Powers. I am Assistant Superintendent-Freight of The Long Island Rail Road Company (LIRR), with offices at Jamaica, New York 11435. I have held my present position since August of 1969. Prior to that time, I was employed by the former New Haven Railroad and the Penn Central Transportation Company, after it took over the New Haven on January 1, 1969, in various capacities. These included various duties -- crossing watchman, block operator, signal station operator, centralized traffic control operator, train dispatcher, freight agent, passenger agent, assistant transportation inspector, transportation inspector -- both freight and passenger, chief of locomotive distribution, assistant trainmaster, and trainmaster. Also during that period I had both a reserve and active status in the United States Army. Most of my time with the United States Army was spent in various railroad battalions of the Transportation Corps, including positions as train dispatcher, chief train dispatcher and company commander.

II. Involved Traffic

Traffic destined to General Motors Corporation (GM) at Bethpage, New York totalled 403 carloads during 1976 (count based on date of settled interline abstract). Based on a sample of this traffic, five different origins were involved. A detailed description of the rail movement of this traffic is shown in the testimony of Leroy E. Peabody, Jr.

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III. Description of Traffic

Cars destined to GM arrive in ConRail Train LI-2, a pre-blocked intact train of Long Island traffic which originates at Selkirk, New York and is interchanged with the LIRR at Fresh Pond Jct. LIRR delivers the train to Holban Yard, a distance of 7 miles in LIRR RF-16. At Holban, the Long Island City and Fresh Pond blocks are set over to adjacent tracks intact. The Holban block, which contains the GM cars, is manually classified on a gravity hump. GM cars are assembled at Hillside Yard into the Wellwood block of outbound hauler RF-80 which operates between Holban and Sayville. The GM cars are set out at Wellwood, a distance of 21.3 miles from Holban Yard. The GM cars which are set out at Wellwood are placed the next day at the GM side track by RF-64 which operates between Hicksville and Bay Shore. The GM side track is 4.3 miles west of the Wellwood Terminal.

After the cars have been unloaded at GM, RF-64 removes the empties from the GM side track and places them at Wellwood Terminal where they are picked up by westbound RF-81 for movement to Holban Yard. At Holban Yard, RF-81's westbound empties are classified into an interchange train for ConRail by the Hillside drill crew. RF-11 operating westbound from Holban handles the train for delivery to ConRail at Fresh Pond Jct.

IV. Car Hire Expense

Due to the fact that the LIRR is primarily a terminating carrier (in excess of 90 percent of interline traffic is received),

LIRR does not own freight cars. Thus, LIRR does not incur car costs other than through the payment of per diem and mileage payments to the car owners. LIRR is also responsible for the inspection of cars and user repairs.

Car initial and numbers for each of the 40 cars included in the sample of GM traffic described by Witness Peabody were used to determine the date the LIRR received the loaded car and the date the empty car was delivered off line. The car initial and number for the sample cars was also used to determine the time/mileage rates paid by LIRR for the use of foreign line cars. Total cycle days were multiplied by the per diem rate applicable to the sample car to determine the time portion of per diem charges. The mileage portion of per diem charges was obtained by applying the applicable mileage rate for each sample car to the applicable mileage over the LIRR.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
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VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

CHARLES W. POWERS, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Charles W Powers
CHARLES W. POWERS

Sworn to before me this
15th day of February, 1977.

Marsha A. Jenkins
Notary Public

MARSHA A. JENKINS
NOTARY PUBLIC, State of New York
No. 30-4516616
Qualified in Nassau County
Commission Expires March 30, 1978

605a

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

VERIFIED STATEMENT OF JAMES L. FARACI

My name is James L. Faraci, and I am Manager - Pricing and Divisions of Respondent, The Long Island Rail Road Company (hereinafter LIRR), and my office is located at 21st Street and Jackson Avenue, Long Island City, New York 11101.

In my capacity as Manager - Pricing and Divisions, I have the responsibility for the establishing of all freight rates and divisional agreements in regard to freight traffic handled by the LIRR in conjunction with other carriers. I also have the responsibility for the development and maintenance of tariff arrangements covering miscellaneous and incidental service and for the construction and filing of freight tariffs.

Prior to 1954, LIRR's practice was to require industries to bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on LIRR's property. In November of 1954, that policy changed in order to meet the increasing competition of other modes of transportation and to attract additional industry to Long Island. Under the new policy, the industry paid the cost of constructing that portion of the sidetrack beyond the right-of-way line. Also, the LIRR was responsible for the maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, LIRR returned to its pre-1954 policy which required industries to

bear the entire cost of maintaining the private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before GM refused to execute the same type of contract signed by other shippers or receivers.

Litigation before the U.S. District Court for the Eastern District of New York and before the Commission followed. Copies of the report of Division 3 of the Commission and the opinion of the District Court were attached to GM's protest. Upon referral from the District Court, in its report and order on reconsideration in Docket 35790, General Motors Corp., Long I. R. Priv. Sidetrack, 351 I.C.C. 691, 699, the Commission's Division 3 found that, on the record made, LIRR could not lawfully impose the proposed maintenance charge on GM. Division 3 made it clear, however (at pp. 698-699):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."

As shown by the attached verified statements of L. E. Peabody, Jr., Charles W. Powers and Charles H. Gaut, the existing level of line-haul rates to GM's plant at Bethpage, N.Y., are not unreasonable, and, in fact, are

extremely low to the extent of being non-compensatory, and will continue to be so, despite the additional charge for maintenance, and the proposed separate maintenance charge is reasonable, nondiscriminatory, nonpreferential and nonprejudicial.

LIRR would prefer its normal method of entering into contractual arrangements with shippers and receivers for the maintenance of switch connections under Section 1(9), but is bowing to the Commission's ruling in publishing the per-car maintenance charge at GM's Bethpage plant.* The tariff makes it clear that such a per-car charge will be published only "where no contractual arrangement exists for the maintenance of switch connection to such private siding." In affirming the Commission's decision, the District Court made it clear that its decision applied only to the Bethpage switch connection (footnote 5), and LIRR intends to continue to be reimbursed for maintenance of other switch connections by contractual arrangements, with separate tariff charges to be published only where a shipper or receiver, like GM, refuses to enter into such contractual arrangements.

---

* Subsequent to its decision in the General Motors case, Division 3 made it clear in Docket No. 36163, Allied Container Corporation v. Maine Central Railroad Company, decided October 27, 1976, that a railroad has a right to reasonable compensation for the cost of maintaining a switch connection and that the practice of charging patrons separately may be a reasonable method of compensation under Section 1(9). Further, the right of a railroad to recover its maintenance costs by separate contract was recognized by Administrative Law Judge Mittelbronn in his Initial Decision in ICC Docket No. 36453, Lewis & Michael Inc. v. Consolidated Rail Corp., dated January 28, 1977.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

The involved GM traffic moving to Bethpage is among the most unprofitable handled by LIRR and, based on available 1976 average revenue figures and 1975 costs, LIRR would need an additional $315 per car to break even on GM's Bethpage traffic. Obviously, the $4.39 being obtained by the LIRR under the tariff under investigation herein is only a "drop in the bucket" when compared with the loss it is sustaining on each and every GM car it is presently handling.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

JAMES L. FARACI, being first duly sworn, on oath deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated to the best of his information and belief.

James L. Faraci
JAMES L. FARACI

Sworn to before me this
15th day of February 1977.

SEAL

Mary Gallo
Notary Public

MARY GALLO
NOTARY PUBLIC, State of New York
No. 52-1365325, Suffolk County
Term Expires March 30, 1977

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

VERIFIED STATEMENT OF CHARLES H. GAUT

My name is Charles H. Gaut. I am Assistant Chief Engineer - Maintenance of Way, for The Long Island Rail Road Company.

At the request of James L. Faraci, Manager-Pricing and Divisions, I developed and furnished for him the estimated annual cost for the maintenance, inspection and general depreciation of the switch connection and associated trackage on the Long Island Rail Road's right of way in connection with the private siding of General Motors Corporation at Bethpage, New York.

I have estimated the cost of construction of this switch connection as follows:

Switch connection (material)	$12,400
Labor (including fringe benefits)	14,000
100 ft. track	4,000
Total depreciable construction cost	$30,400

Utilizing a life expectancy of 25 years, the annual depreciable cost for the switch connection and associated trackage is $1,216. Our average cost for inspection, lubrication and snow removal is $600 and another $600 per year is the average cost for general maintenance of the switch. Thus, the estimated total annual maintenance and depreciation for the switch connection and associated trackage is $2,416 per year.

OPENING STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

The foregoing construction costs are based upon current wages and prices. Since the General Motors private siding at Bethpage was constructed in 1965, the actual depreciable cost would be approximately one half that indicated above. Thus, the proper figure for the General Motors siding for depreciation should be $608 per year which, when added to the $1,200 cost for maintenance and inspection, will give a total annual cost of $1,808.

VERIFICATION

STATE OF NEW YORK)
: ss.;
COUNTY OF QUEENS)

CHARLES H. GAUT, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Charles H. Gaut
CHARLES H. GAUT

Sworn to before me this
15th day of February 1977.

Marsha A. Jenkins
Notary Public

MARSHA A. JENKINS
NOTARY PUBLIC, State of New York
No. 30-4516616
Qualified in Nassau County
Commission Expires March 30, 1978

LETTER, DATED MARCH 7, 1977, GENERAL MOTORS CORP.,
TO MS. JANICE M. ROSENAK.

GENERAL MOTORS CORPORATION

March 7, 1977

Ms. Janice M. Rosenak
Deputy Director
Section of Rates
Office of Proceedings
Interstate Commerce Commission
Washington, D. C. 20423

Re: Docket No. 36516, Switch Connection
Charge at Bethpage, New York --
Long Island Rail Road

Dear Ms. Rosenak:

By Order dated January 28 and served January 31, 1977, Commissioner O'Neal ordered that the above-styled matter be handled under modified procedure. In accordance with the time schedule of that Order, Opening Statements of Facts and Argument on behalf of Respondent Long Island Rail Road were due and received on February 22, 1977. Protestant's Statements of Facts and Argument in reply are due March 24. General Motors Corporation is a Protestant in this proceeding. The undersigned is counsel for Protestant.

A major portion of Respondent's opening presentation is the verified statement of Mr. Leroy E. Peabody, Jr. discussing and describing a Rail Form A cost study conducted by him to determine the profitability of traffic moving to Protestant's facility at Bethpage, New York.

Following my request of February 25, 1977 upon Mr. Stokes, counsel for the Long Island Rail Road for an opportunity to examine and be furnished with

LETTER, DATED MARCH 7, 1977, GENERAL MOTORS CORP.,
TO MS. JANICE M. ROSENAK

copies of the workpapers underlying Mr. Peabody's presentation Protestant was permitted on March 2 to examine the underlying documents and we were furnished with copies of certain workpapers. While we were permitted to examine Mr. Peabody's Form A study, we were not allowed to make a copy thereof. As a consequence, Protestant has been hampered in its analysis of Respondent's cost evaluation and is unable to complete its reply statements until it has had an opportunity to cross-examine not only Mr. Peabody, but two other witnesses for Respondent, Messrs. Faraci and Gaut. Messrs. Faraci and Gaut each submitted a verified statement but in addition thereto provided basic data to Mr. Peabody which we have not had an opportunity to examine. Were it not for the Rail Form A cost analysis this matter could probably be disposed of without prior cross-examination; however, Protestant cannot make a meaningful reply until it has had an opportunity to cross-examine the aforementioned witnesses in order to determine what procedures were followed and factors considered in the conduct of the Rail Form A study.

Accordingly, it is requested that this matter be set down for cross-examination as promptly as possible to expedite disposition of this investigation. Since the tariff supplement containing the protested switch connection charge is in effect and being assessed and collected by Respondent from Protestant, there can be no adverse affect upon either party by this slight delay in the proceedings.

The undersigned undertook to contact Mr. Stokes to obtain his concurrence in this request, but was advised that he was away from his office on Friday, March 4 and today, March 7. His office was informed of the purpose of the call, and a copy of this letter is being sent to him.

LETTER, DATED MARCH 7, 1977, GENERAL MOTORS CORP.,
TO MS. JANICE M. ROSENAK

In making this request, I am aware of the time requirements imposed upon the Commission in Section 303(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 and do not believe that the request if granted would interfere with those time requirements.

Very truly yours,

Benson T. Buck
Attorney in Charge
of Transportation

bl

cc: Mr. Richard H. Stokes
The Long Island Rail Road

Mr. Walter J. Myskowski
Attorney for The Long Island Rail Road

Mr. William Anderson
Applied Economics, Inc.

TELEGRAM ADDRESSED TO JANICE M. ROSENAK.

VIA WESTERN UNION (delivered by messenger)

MS. JANICE M. ROSENAK
DEPUTY DIRECTOR, SECTION OF RATES
OFFICE OF PROCEEDINGS
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C. 20423

RE PROTESTANTS' STATEMENT OF FACTS AND ARGUMENT IN DOCKET 36516 DUE MARCH 24, ALTHOUGH NO RESPONSE TO MY LETTER OF MARCH 7 REQUESTING CROSS-EXAMINATION, MUST REQUEST AN EXTENSION OF TEN DAYS IN WHICH TO FILE BECAUSE OF DEATH IN FAMILY REQUIRING MY ABSENCE FROM OFFICE UNTIL MARCH 25. AM AUTHORIZED TO STATE COUNSEL FOR RESPONDENT HAS NO OBJECTION TO THIS POSTPONEMENT.

BENSON T. BUCK
ATTORNEY IN CHARGE
OF TRANSPORTATION
GENERAL MOTORS CORPORATION
3044 W. GRAND BLVD.
DETROIT, MICHIGAN 48202

bl

cc: Mr. Richard Stokes
Long Island RR

ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED MARCH 24, 1977.

INTERSTATE COMMERCE COMMISSION

No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N. Y., LONG ISLAND RAILROAD

IN THE MATTER OF A REQUEST FOR ORAL HEARING FOR THE PURPOSE OF CROSS-EXAMINATION

PRESENT: A. Daniel O'Neal, Commissioner, to whom the above-entitled matter has been assigned.

Upon consideration of the record in this proceeding, including the letter of protestant, General Motors Corporation, filed March 7, 1977, requesting oral hearing for the purposes of cross-examination; and

It appearing, That, pursuant to the Commission's order of January 26, 1977, in this proceeding, respondent has filed its opening statement of fact and argument under the modified procedure; that protestant seeks cross-examination of the persons submitting verified statements in behalf of respondent; that in support of its request, protestant states that, although respondent has allowed protestant access to its Rail Form A study and certain of the underlying workpapers, respondent has refused to allow protestant to copy that study and the workpapers; and that in lieu of a copy of the study and the workpapers, protestant needs the opportunity to cross-examine respondent's witnesses in order to properly evaluate respondent's cost evidence;

It further appearing, That protestant's request fails to conform with the requirements of Rule 53(a) of the Commission's General Rules of Practice (49 CFR 1100.53(a)), including the requirement that a party requesting oral hearing for the purposes of cross-examination identify the material facts at issue;

And it further appearing, That convenient access to respondent's Rail Form A study and the underlying workpapers to that study is warranted in light of respondent's reliance thereon;

Wherefore, and for good cause:

It is ordered, That the request for oral hearing be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED MARCH 24, 1977

No. 36516

It is further ordered, That, on the service date of this order and thereafter, respondent make available to protestant the Rail Form A study and the underlying workpapers for the purposes of inspection and copying.

And it is further ordered, That the due date for protestant's opening statement of fact and argument be, and it is hereby, extended to April 4, 1977.

Dated at Washington, D. C., this 22nd day of March, 1977.

By the Commission, Commissioner O'Neal.

ROBERT L. OSWALD,
Secretary.

(SEAL)

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

SWITCH CONNECTION CHARGE

AT BETHPAGE, NEW YORK

--LONG ISLAND RAIL ROAD

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

DENNIS J. HELFMAN and
BENSON T. BUCK
3044 West Grand Boulevard
Detroit, Michigan 48202
Attorneys for Protestant
General Motors Corporation

Of Counsel:

FRAZER F. HILDER
3044 West Grand Boulevard
Detroit, Michigan 48202

Dated: April 4, 1977

Due Date: April 4, 1977

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

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PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

SWITCH CONNECTION CHARGE

AT BETHPAGE, NEW YORK

--LONG ISLAND RAIL ROAD

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

INTRODUCTION

This investigation of the lawfulness of a switch connection charge of $4.39 per rail car published in LIRR Freight Tariff 72, I.C.C. 1119, is the continuation of litigation caused by The Long Island Rail Road (Respondent) in its attempt to transfer a basic common carrier obligation from itself to a shipper-consignee. The charge applies only to Protestant General Motors Corporation and is in addition to the line haul rate paid for the involved transportation. The charge is unjust, unreasonable and constitutes an unlawful rate-making practice.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

I. Facts

The basic facts of this investigation are not in dispute. In 1965 Protestant built a large facility at Bethpage, Long Island for the purpose of warehousing, selling and distributing automotive replacement parts. The Bethpage Distribution Center is located adjacent to Respondent's main line and is served by Respondent through a private industrial sidetrack which connects with the main line of the Long Island Rail Road through a switch connection. At the time the sidetrack was constructed, Respondent's prevailing practice dictated that the railroad would pay for the construction of the sidetrack from the switch point to that point of the sidetrack just clear of the railroad's right-of-way.[1/] Protestant paid the construction cost for the remainder of the sidetrack. Since 1965, when the private sidetrack was first placed in service, Respondent has assumed the expense of maintaining the switch connection and that portion of sidetrack located within its right-of-way while Protestant has been respondible for the remainder of the sidetrack.

In the early 1970's, Respondent changed its mind and sought to have Protestant execute a sidetrack agreement

1. General Motors Corp. Long I.R. Priv. Sidetrack 3911.66 691,692

whereby Protestant would be obligated to bear the maintenance expense for the switch connection and that portion of the sidetrack owned by and located on Respondent's right-of-way. Protestant could not agree to such terms and in the fall of 1972 Respondent threatened to terminate service to the Bethpage facility unless Protestant agreed to such terms.

Thereupon Protestant obtained a temporary restraining order in the United States District Court for the Eastern District of New York, enjoining Respondent from halting rail service. During the pendency of that restraining order the matter was referred to the Interstate Commerce Commission for resolution of the respective rights and duties attending the involved switch connection. That matter became Docket No. 35790, General Motors Corp. Long I.R. Priv. Sidetrack, and on June 10, 1975 Division 3 affirmed the initial decision of the Administrative Law Judge holding that the Long Island Rail Road Company could not lawfully precondition continued rail service to General Motors Corporation upon General Motors agreement to bear the maintenance expenses for the switch connection to that private sidetrack. Subsequently, the proceeding was reopened

upon the Commission's own motion and a report and order upon reconsideration was issued, the syllabus of which reads:

> "Upon reconsideration, carrier's attempt to condition continued rail service at shipper's private sidetrack upon that shipper's agreement to bear the switch connection maintenance expense found unlawful. Prior decision affirmed and proceeding discontinued." (351 I.C.C. 691)

Thereafter the Commission's report and order on Reconsideration was sustained by the United States District Court for the Eastern District of New York in a Memorandum of Decision and Order in Case No. 72 C 1549 by Chief Judge Mishler on November 19, 1976 (Appendix A). A permanent injunction was granted against Respondent restraining it from ceasing service at Protestant's Bethpage siding. Respondent then appealed to the United States Court of Appeals for the Second Circuit, which appeal has been deferred indefinitely pending disposition of this investigation. In the meantime, traffic continues to move to the Bethpage facility at the rate of two rail carloads daily (Witness Burke, p. 3).

II. Argument

While the thrust of Respondent's case is designed to illustrate that the LIRR loses money on Protestant's traffic, its argument runs counter thereto, asserting instead that the rate level on auto parts traffic is reasonable. Commencing its argument at the bottom of Page 3 and carrying over to the top of Page 4, we find the assertion:

> ". . . the existing level of line-haul rates to GM's plant at Bethpage, N.Y. is reasonable--and, in fact is extremely low. . ."

Again, on Page 7, the argument is repeated:

> "Although the average revenue and cost figures mentioned above would appear to be sufficient to show that the level of rates, despite the added maintenance charge would be reasonable (if not too low) the accompanying Verified Statement of Leroy E. Peabody, Jr. (4) presents revenue cost comparisons on the specific GM Bethpage traffic which prove this beyond a shadow of a doubt." (emphasis supplied)

Respondent's argument in this regard is difficult to comprehend. Witness Peabody's revenue-cost comparisons purport to show that the revenues produced by auto parts traffic cover only 59% of the variable cost

of the entire movement, whereas the revenues received by LIRR for its portion of the haul cover only 54% of its variable costs of handling the traffic. Despite that, Respondent maintains that the rate level of the traffic is reasonable. Either Respondent's argument is entirely inconsistent with its revenue-cost comparisons, or else that data is incorrect, meaningless, and of no value in this type of proceeding. An analysis of the data shows that it is incorrect and meaningless; review of Commission precedent reveals that rail cost of operations studies are of little, if any, value in determining maximum reasonableness.

A. Rail Operating Costs Alone Are Not A Proper Standard For Measuring Maximum Reasonableness

Since we are concerned with the lawfulness of a new charge to be imposed in connection with and in addition to the applicable line haul rate, the switch connection charge necessarily becomes an integral part of and an increase to the existing rate level. The fundamental issue then is whether the combination of the charge and the line haul rate exceeds a maximum reasonable level. In determining maximum reasonableness of a rate, the Commission has repeatedly said that rail operating costs alone are not a proper standard in determining maximum limits of rates. Class Rate Investigation, 1939, 262 I.C.C. 447, 693 (1945); Southeastern Assn. of

R. & Util Commrs v. A., T. & S. F. Ry., 321 I.C.C. 519, 545 (1964).

In M. E. Derryberry Co. v. Alabama G. S. R. Co., 237 I.C.C. 75 (1940), the Commission said:

> "Numerous of the rates upon which complainants rely, because they were found by this Commission to be reasonably compensatory, afford no proper measure of maximum reasonable rates, as there may be a wide difference between a rate which, made on the out-of-pocket cost theory, is reasonably compensatory and one which is at the maximum limit of reasonableness." (p. 83)

Thereafter, in General Motors Corp. v. New York Central R. Co., 311 I.C.C. 622, 625 aff'd General Motors Corp. v. New York Central R. Co., 207 F. Supp. 641 (E.D. Mich 1962), the Commission again held that cost data was of little value in determining the issue of maximum reasonableness.

In this connection, it is noteworthy that Respondent offered no Commission precedent to support its showing that costs alone demonstrate the reasonableness of the proposed increased rate level.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

The rule of law applicable here is that the determination of reasonableness is a judgment matter based upon the consideration of all circumstances in a given situation, no one necessarily being of controlling importance. Chicago Board of Trade v. Illinois Central R. Co., 329 I.C.C. 529, 534 (1967); Albany Port District Comm. v. Ahnapee & W. Ry. Co., 219 I.C.C. 151, 164 (1936)

What is of importance in judging the lawfulness of this charge is that the carrier is seeking through this type of rate-making practice to be reimbursed a second time for maintaining a facility which it is obligated to provide as a common carrier, and for which it has already been compensated out of the line haul rate. Long ago the Commission held that the conduct of the business of a common carrier by rail embraces, among other things, the maintenance of its right-of-way. Valley & Siletz R.R. Co. v. S. P. Co., 53 I.C.C. 397, 399 (1919). Consistent therewith, the Commission has steadfastly recognized that it is a carrier's duty to maintain facilities at its terminals that are adequate to handle the traffic transported by it. Anaconda Copper Mining Co. Terminal Service, 266 I.C.C. 387, 393 (1946).

The Courts and the Commission have expressly found that it is a railroad's obligation as a common carrier to construct and maintain a switch connection. See Cleveland, C. C. & St. L. Ry. Co. v. United States, 275 U.S. 404 (1928), affirming J. K. Dering Coal Co. v. Cleveland, C. C. & St. L. Ry. Co., 96 I.C.C. 143 (1925) and 109 I.C.C. 55 (1926). In that case, the shipper had constructed his private side-track up to the right-of-way of the railroad. The Commission found, inter alia, that the switch connection should be constructed and maintained by the railroad. See 96 I.C.C. at 153 and 275 U.S. at 406. See also Sioux City Term. Ry. Switching, 241 I.C.C. 53, 70 (1940).

Likewise, in Merchants Refrigerating Co. v. New York Central R. Co., 238 I.C.C. 599 (1940), the Commission said, at page 601:

> "It is customary, in connection with arrangements for private sidings, for defendant to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line." (p. 601)

In this case, Respondent, a carrier, seeks to impose upon Protestant, a shipper, the cost of maintaining the switch connection up to and including the point of switch, all

on the railroad's right-of-way.

More recently, in Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (1964), the Commission, in entering an order requiring the defendant railroad to construct and maintain a switch connection, found, at page 73, that:

> "The entire cost of this connection estimated at $5,300 and which will be located entirely on defendant's property, will be borne by defendant. Complainant will complete the private sidetrack and bear the cost and maintenance of such track which is located on its property. Construction and maintenance of this connection is justified." (p. 73)

These findings by the Commission that a railroad should bear the cost of construction and maintenance of a switch connection, are not discretionary policy choices, but are a reflection of the general duty imposed upon all common carriers by railroad to provide and furnish transportation upon reasonable request. See Section 1(4), 49 U.S.C. §1(4), and Huerfano Coal Co. v. Colorado & S.E.R. Co., 28 I.C.C. 502, 505 (1913). Cf, Schlicher v. Director General, 62 I.C.C. 181, 187 (1921). This duty requires Respondent to furnish at its expense the facilities necessary

to discharge its obligations as a common carrier. Contrary to what Respondent would have the Commission believe, the traffice in question provides ample revenue to reasonably compensate carriers for the provision of such facilities and Protestant should not be compelled to again reimburse Respondent for the maintenance of the switch connection above and beyond the revenues received for the traffic moving over the switch connection.

B. The Best Evidence Available Establishes That The Rates On Automotive Parts Traffic Are At An Historically High Level

Statistical indices prepared by the Commission's staff known as rail revenue contribution studies or "Burden Studies" (Appendis B, p 24) are generally considered the best evidence to measure the contribution made by rates on specific commodities to railroad revenue in general. The authenticity of such studies, while repeatedly challenged by various parties, in prior proceedings has been consistently recognized by the Commission as the best evidence available.

The revenue contribution studies were described by the Commission in Increased Freight Rates, 1956, 298 I.C.C. 279 (1956) as follows:

> "For the last several years, our staff has made a study of the rail revenue contribution by commodity groups. The term 'revenue contribution,' as used in this study, refers to the amount by which revenues exceed or fail to meet out-of-pocket costs. In this study the out-of-pocket costs are based on the direct expenses, rents, and taxes, plus a return of 4 percent on the equipment and 2 percent on the road property, adjusted as to each commodity class to reflect the type of equipment, the average tare weight, the load per car, and the empty-car movement." (at 328)

Use of the studies in measuring the relative profitability of particular movements of freight was criticized by the railroads in the 1956 case. After a thorough discussion of the railroads' criticism therein the Commission concluded:

> "The contribution studies as prepared by our staff continue to be the best data we have to determine, for movements of commodities within and between the various territories, relative out-of-pocket costs of the several commodity classes and the contribution in excess of the out-of-pocket costs provided by the various commodities." (at 330)

See also: Increased Freight Rates, 1951, 281 I.C.C. 557, 610 (1951); 297 I.C.C. 17, 37 (1955).

In Increased Freight Rates, 1958, 304 I.C.C. 289 (1958), the Commission announced at the outset of that proceeding that official notice would be taken of transportation

statistics contained in the then current rail revenue contribution study (at 293). Although various criticisms and comments with respect to that study were made by various parties, the Commission again concluded that the criticisms did not invalidate the results of the study (at 308).

Since then the Commission has continued to find that these burden studies are based on the most reliable information available representing impartial efforts to reflect revenue-cost relationships and are of significant probative value. This was reaffirmed in Investigation of Railroad Freight Rate Structure, 345 I.C.C. 1 (1973), as follows:

> "While those deficiencies may cast some doubt on the accuracy of 1969 burden study results in certain respects, they are not of such a magnitude as to invalidate the entire burden study, or the comparison with the 1966 burden study. Furthermore, the 1966 and 1969 burden studes are based on the most reliable information available, and represent impartial efforts to reflect principally revenue-cost relationships on various commodities. It is recognized that the aggregate character of the burden studies may not produce the refined traffic, revenue, and cost data, necessary for an exacting analysis of individual commodity movements. These studies, nevertheless, are of significant probative value and are useful tools for determining the direction of further investigations." (at 11)

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

In Ex Parte 281, Increased Freight Rates and Charges, 1972, 341 I.C.C. 290, the Commission in reliance upon the Burden Study found that automotive traffic traditionally has borne higher freight rates and made a greater contribution to carrier revenues than all other carload traffic. That finding is as follows:

> "Automotive parts and completed vehicles presently move and have historically moved at a high level of rates. Thus, the following data taken from the 1966 Rail Burden Study, statement No. 153-71, 'Rail Revenue Contribution by Commodities and Territories,' compares the greater burden which automotive traffic bears to all carload traffic:
>
> | | Revenue as a percent of Variable Costs | Fully Allocated Costs |
> |---|---|---|
> | All carload traffic | 131.0 | 109.5 |
> | Vehicles and equipment | 150.9 | 138.2 |
> | Vehicles | 142.4 | 132.1 |
> | Bodies and body parts | 145.0 | 134.0 |
> | Parts | 162.2 | 145.7" |
>
> (emphasis supplied) (at 349)

Protestant relies upon the current Burden Studies to prove that rates on automotive traffic are not only on an historically high level, but that the revenue from that traffic continues to make a greater contribution to railroad revenue than the principal commodities hauled by the railroads. This evidence also showed that this traffic is more profitable

than the average of all carload traffic transported by the eastern railroads (Appendix B, p. 25). The results of the Burden Studies in this regard are confirmed by a proper application of other recognized statistical measures as shown in the Verified Statement of Protestant's Witness Anderson (Appendix B).

C. Respondent's Cost-Revenue Comparisons Are Incorrect, Faulty and Unreliable

In analyzing Respondent's rail-cost summary, Witness Anderson detects numerous falacies and errors in the evaluation made by Mr. Peabody on behalf of the LIRR so as to cast doubt on Respondent's cost-revenue comparisons.

1. First Mr. Anderson points out that there are certain infirmities in the Peabody sample of interline abstracts. No stratification, replication or standard error was made to determine whether there was bias in the sample. A comparison of the LIRR sample with Protestant's universe data shows that when the samples are tested with actual characteristics of the traffic movement revenue has been greatly understated and rail costs overstated. For instance on 25 percent of the sample movements, Mr. Anderson has shown that Protestant actually paid considerably more revenue per car than was reflected on the settlement abstracts

from which Mr. Peabody calculated cost-revenue comparisons. The result is an understatement by Respondent of the revenues earned on the traffic actually moving to Protestant's Bethpage facility.

2. In pricing the involved traffic, Mr. Peabody used a tare weight sample of 36.0 tons per car taken from the 1974 I.C.C. cost scales representing a box-general service equipper car. Mr. Anderson shows why this amounts to an overstatement of costs because an analysis of the cars in the LIRR sample shows the weighted average tare weight to be 33.16 tons -- almost 10 percent less than the general average data utilized, this, of course resulted in an overstatement of the cost of service. In a review of the underlying documents made available to Protestant, there is no explanation why Mr. Peabody relied upon an average tare weight factor from the cost scales when he had available sufficient information to make the necessary adjustment to reflect actual experience.

3. When it came to making an operating study of trains on the LIRR, Mr. Peabody used an entirely different type of sampling technique than he used on the traffic study. He used a judgment sample on train operations

whereas a random sample was made of the traffic. However, since there were no workpapers underlying the train study available prior to the March 28 order denying cross-examination, there was no time thereafter in which to examine possible underlying data at Respondent's offices and still meet the April 4 filing date. In view of that handicap, there was no way of checking either the accuracy or reliability of the statistics drawn from the sample of the train study.

4. Another major overstatement of rail costs was detected with regard to switching at Bethpage. While the LIRR presentation studied a year's traffic to establish revenues, car costs and routing, and a ten-day study was attempted on train operation between Fresh Pond and Bethpage, no study was made of the switching operation at Protestant's facility. Rather than use the 1974 eastern district average for Region II of $38.91 per carload, indexed to current levels, Mr. Peabody instead used a carrier average of $138.87. Thus he showed a cost of 221 percent higher than the Eastern District average factor, which, of course, includes LIRR experience.

There is probative evidence available to show that this item of cost is not only overstated but not applicable to the service performed. In Docket 35790, a

LIRR official introduced evidence that switching for handling four loads in and four empties out amounted to 45 minutes. This calculates to 5.6 minutes per car compared to 18.6 minutes per car built into the LIRR Rail Form A system average figure. Based upon LIRR's known experience in Docket 35790, Mr. Anderson was able to restate Mr. Peabody's 37.2 minutes per car down to a more realistic 30.1 minutes per car.

5. While using specific but questionable system data for the LIRR in certain instances in pricing out the movement of this traffic, Mr. Peabody failed to make adjustments in the rail operations in the east to eliminate elements of service which are not incurred and which should have been known to Respondent. For instance, on the route from South Bend, Indiana, he charged the traffic with an interchange cost between the Norfolk & Western Railroad and a subsidiary, the New Jersey, Indiana and Illinois Railway Co., when in fact the latter has long since ceased to operate and such an interchange does not occur. Similarly, on the route from Olney, Pennsylvania, he added interchanges for connections between the Reading, Central of

New Jersey and Conrail, whereas, since April 1, 1976 the former two operations have all been merged into Consolidated Rail Corporations. Again these discrepancies constituted an overstatement of the rail operating costs.

D. Evaluation Of The Total Movement In The East By Proper Costing Techniques Proves Existing Rate Levels Are Adequately Compensatory

Protestant's cost-revenue comparison utilizing the actual freight revenues collected on this traffic by the eastern railroads with the cost of operation employing Region II eastern district average cost factors demonstrate the profitability of the existing rate levels on auto parts. As explained in Mr. Anderson's statement, this cost evaluation produces more reliable results than the technique employed by Respondent. It realistically reflects the known characteristics of the traffic and the actual operating results as reported by all of the carriers in the region where this traffic is actually transported.

The Commission has said that to determine whether rate levels on a particular commodity carry their proper share of the transportation burden, evaluation of the total movement of all commodities and their relation to the total

burden and to each other is required (Emphasis supplied). See Increased Freight Rates, 1971, 339 I.C.C. 125, 190. It is apparent then that the partial and inaccurate cost-revenue comparison proposed by Repondent could not fairly indicate whether the rates on Protestant's traffic carries a reasonable share of the transportation burden. On the other hand, proper use of appropriate and tested indicators such as the Burden Study and Commission Cost Scale factors proves conclusively that auto parts rates contribute more than their fair share of the transportation burden.

E. Respondent's Financial Condition Is More Attributable To Its Rate-Making And Operating Practices Than To Existing Levels Of Line Haul Rates

The Verified Statements of Protestant's Witnesses Anderson and Burke contain numerous examples of questionable rate-making, operating and management practices which seem to be the real causes of Respondent's financial ills. Inordinately high labor and terminal costs, unreliable train service, poor car handling and indecisive rate-making practices have produced burdens of transportation and financial deficits which could not be erased by any reasonable freight rate structure. Mr. Burke details the number of times Respondent failed to remove empty cars from the Bethpage

plant after the carrier had been notified of that fact thereby unnecessarily increasing its car costs. Also he points out the number of days Respondent failed to provide normal daily switching, as well as the unrealistically long transit time incurred by LIRR on each car movement compared to its infinitely small portionof the total route miles. This is deplorable utilization of equipment, facilities and resources. Such undependable and unsatisfactory services cry for improved transportation economics and utilization.

Moreover, Respondent's indecisive rate-making practices, rather than freight rate levels, unquestionably contribute to its financial plight. Management action which caused Respondent to flag out on five general freight increase proceedings (Appendix C, p. 9) seems inconsistent with any assertion now that rates on a specific group of traffic are unprofitable. Although Respondent subsequently reversed its position on three of the general freight rate increases, the loss of additional freight revenue attributable to management rate-making decisions unmistakably contributed to Respondent's growing deficit.

Characteristic of the weakness in Respondent's position is the ridiculous suggestion on page 6 of their argument that GM is getting a "free ride" and a preference by resisting the per car maintenance expenses, and that failure to publish the charge on GM traffic would constitute an Elkins Act violation. Respondent raised essentially the same argument in the appeal of Docket 35790 before the United States District Court for the Eastern District of New York. That argument was rejected by Chief Judge Mishler in footnote 6 to his decision (Appendix A, pp. vi, vii).

Another infirmity in Respondent's argument is sole reliance for case authority upon a decision of Division 3 in Docket 36163, Allied Containers Corporation v. Maine Central Railroad Company. That decision is of questionable authority since it has been stayed pending appeal.

CONCLUSION

Respondent has attempted to prove the proposed charge lawful by showing that revenue from the line haul rate does not cover its costs of operation. Despite what it attempted to show, it has not proved that the level of rates on automobile parts is unreasonably low or non-compensatory. Nor has it proved that the line haul rates

do not provide compensation adequate to maintain the switch connection. Instead, what respondent has shown is that it has an extremely high cost of operation, which costs may exceed the division of revenue that it receives from the joint through line haul rates. That, however, is another matter separate, distinct and entirely unrelated to the issues in this proceeding. It does not prove that the instant charge is just, reasonable, or lawful.

Respectfully submitted,

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Dated: April 4, 1977

Due Date: April 4, 1977

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first-class mail a copy thereof properly addressed.

Dated at Washington, D. C., April 4, 1977.

Benson T. Buck, Attorney

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -

72 C 1549

GENERAL MOTORS CORP.,

Plaintiff,

-against-

Memorandum of Decision and Order

THE LONG ISLAND RAIL ROAD COMPANY,

November 19, 1976

Defendant.

- - - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

Plaintiff seeks an order affirming a decision of the Interstate Commerce Commission and permanently enjoining suspension of rail freight service over a switch connection maintained by the defendant. Jurisdiction here is predicated on §17(9) of the Interstate Commerce Act, 49 U.S.C. §17(9), and 28 U.S.C. §§1336, 1337 and 1398.

The General Motors Corporation (GMC) is a Delaware corporation, licensed to transact business in the State of New York. One of the company's unincorporated divisions, General Motors Parts Division, is located in Bethpage, Long Island. From its Parts Distribution Center in

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Bethpage, GMC conducts warehousing and distribution operations, receiving an average of ten to fifteen rail freight carloads of automobile and truck parts each week. The defendant, the Long Island Rail Road Company (LIRR), a rail freight carrier, provides rail service to the parts facility's private sidetrack by way of a switch connection. It is over the maintenance cost of the switch connection that the parties—the giant of automobile manufacturers and a less than thriving railroad—do battle.

In 1965, when the Bethpage sidetrack was placed in service, the LIRR bore the expense of maintaining both the switch connection and that portion of the sidetrack located within its right-of-way, while GMC paid for the maintenance of the remainder of the sidetrack. Beginning in 1970, because of its severe financial problems, the LIRR sought to require GMC and other private sidetrack users to assume, by way of a separate charge, the maintenance expenses of their switch connections. When GMC refused to pay the switch connection maintenance costs, the LIRR threatened to terminate service to the Bethpage sidetrack. In response, on November 14, 1972, GMC obtained a temporary restraining order, enjoining the LIRR from halting rail service. Sub-

sequently, pursuant to this court's order of December 7, 1972, the parties submitted the dispute to the Interstate Commerce Commission (ICC). On May 6, 1974, the administrative law judge ruled that the LIRR was adequately compensated for the maintenance expenses of the switch connection and that the LIRR could not halt rail service to the private sidetrack. The decision of the administrative law judge was affirmed by the ICC on June 10, 1975. Upon reconsideration of its own motion, the ICC again affirmed the administrative law judge's ruling. Following this ruling, the plaintiff applied to this court for a permanent injunction restraining defendant from halting service on the sidetrack at the Bethpage facility. The defendant seeks to set aside the decision of the ICC.

Under §1336(b) of 28 United States Code, when a district court refers a dispute to the Interstate Commerce Commission,

> the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

However, the scope of judicial review of the ICC's orders

is strictly limited. 5 U.S.C. §706. The reviewing court is restricted

> to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene.

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536, 66 S.Ct. 687, 698 (1946). See AAACon Auto Transport Inc. v. United States, 317 F. Supp. 1314, 1315 (S.D.N.Y. 1970); Neptune World Wide Moving, Inc. v. United States, 284 F. Supp. 135, 138 (S.D.N.Y. 1968); James Hughes, Inc. v. United States, 292 F. Supp. 372, 373 (S.D.N.Y. 1968). See also Resort Bus Lines, Inc. v. Interstate Commerce Commission, 264 F. Supp. 742, 746 (S.D.N.Y.1967). Thus, this court does not have the power to disturb the ICC's ruling unless it is "contrary to law, arbitrary, capricious, or unsupported by substantial evidence based on the record before it." Seaboard Airline Railroad Co. v. United States, 387 F.2d 651, 656 (Ct.Cl. 1967); see McLean Trucking Co. v. United States, 387 F.2d 657 (Ct.Cl. 1967).

In the present case, the parties were in

essential agreement on the facts. Thus, the only issue for this court is whether the ICC correctly interpreted and applied the relevant statute, §1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9).[1] This statute requires any common rail carrier to construct and maintain on reasonable terms a switch connection between the railroad's own tracks and the private sidetrack of an interstate shipper, provided the switch connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." If the shipper's application to the railroad for a switch connection is refused, the shipper can request an investigation by the ICC, which, after making findings of practicability and safety, may order the carrier to construct the switch connection.

The ICC, in its final decision on reconsideration, General Motors Corp. v. Long Island Rail Road Company, 351 I.C.C. 691 (1976), concluded that GMC had met the statutory criteria of §1(9) entitling it to a switch connection: the connection could be installed and operated with safety; the switch connection was reasonably practicable; and the connection would furnish sufficient

business to justify its construction and maintenance. See Imperial Wheel Co. v. St. Louis, I.M. & S. Ry. Co., 20 I.C.C. 56, 59 (1910). Since there had been no change in these conditions, "respondent's statutory obligation to provide switch connection service remains." Id. at 696. This finding was supported by substantial evidence, and we need not elaborate further. With respect to the LIRR's claim that it was not receiving reasonable compensation, and therefore was entitled to impose a maintenance charge on GMC, the ICC stated:

> An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges.

Id. at 697-98.

In seeking to set aside the ICC's ruling, the LIRR claims that, contrary to the Commission's interpretation, §1(9) requires the shipper to assume the maintenance charges; that a carrier is not required to recoup the cost of maintaining a switch connection from its line haul

rates; and that imposition of separate maintenance costs is necessary to avoid discriminating against other shippers. These arguments are unpersuasive, and we find that the ICC decision as to the adequacy of compensation is supported by substantial evidence and that its interpretation of §1(9) is not unreasonable. Accordingly, the Commission's decision is affirmed.

The basic issue before the ICC was whether the LIRR was receiving reasonable compensation for its maintenance of the switch connection.[12] Between 1954 and 1970, the LIRR was responsible for the construction and maintenance costs of the switch connections.[13] At the same time, however, the switch connection was part of the LIRR's entire freight transportation network. Thus, it was necessary for the LIRR to establish that its line haul rates for freight operations did not fully compensate it for the maintenance costs of the switch connection. It attempted to do this with figures attesting to the railroad's financial deterioration. In 1972, for example, the LIRR had total freight revenues of approximately $9.2 million, total freight operating expenses of about $20.7 million, and a net loss from freight operations of $11.5 million.

While these figures are a dramatic indication of the LIRR's financial plight, they are inconclusive of the issue of whether the line haul rates adequately compensated the railroad for its maintenance of the switch connection. Presumably, the line haul rates reflect the cost to the LIRR of the different aspects of its freight operations. The Commission observed, for example, that "maintenance costs are usually changeable [sic] to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection." 396 I.C.C. at 697. See Valley & Siletz R.R. Co. v. Southern Pacific Co., 53 I.C.C. 397, 399 (1919); Klamath County Chamber of Commerce v. Southern Pacific, 74 I.C.C. 207, 213 (1922). See also Merchants Refrigerating Co. v. N.Y.C.R.Co., 238 I.C.C. 599 (1940). Moreover, figures supplied by an independent consultant hired by the LIRR indicate that the rail traffic to the GMC plant at Bethpage produced at least a marginal profit for the railroad.[14] The large operating deficits incurred by the LIRR's entire freight division could be attributed to any number of factors. To further illustrate the irrelevance of the profit-loss figures for the entire freight operations,

under conceivable circumstances, the LIRR could be making a profit on its overall freight operations, and yet be undercompensated for the maintenance cost of the switch connection on the Bethpage track. In that situation, despite the hypothetical profits from other aspects of the LIRR's freight operation, the railroad would be entitled to adequate compensation for the switch connection maintenance.

The ICC's ruling in Allied Container Corp. v. Maine Central, Dkt. No. 36143 (Apr. 29, 1976), does not compel a different result. In that case, which does not yet represent the views of the ICC, the shipper objected to the railroad's imposition of the costs of constructing and maintaining a switch connection. The ICC applied the rationale of its earlier decision in General Motors, supra, concluding that the customary practice of the Maine Central in requiring the shipper to bear the costs of the switch connection was not unreasonable:

> The evidence demonstrates that Maine Central has maintained the same policy for the past 50 years requiring industry to bear the costs of installation and maintenance of private sidetracks including switch connections and spurs or lead tracks. By so doing defendant has not charged those costs to operating expenses, they have not formed a part of its

> rate base, are not recovered by revenue from the line-haul rates and there is no duplication or over compensation. In fact, since such costs are borne by industry, its rate level should be lower than if those costs were borne by the carrier.

Slip.op. at 7.

By contrast, in the present case, when the Bethpage switch connection was built, the LIRR's policy was not to impose a separate maintenance charge on private sidetrack shippers. By implication, the line haul rates absorbed the maintenance cost of the switch connection. Thus, in 1970, when the LIRR changed its policy of the last sixteen years, and sought to impose an additional maintenance charge, it had the burden of demonstrating that the line haul rates did not already provide adequate compensation for the maintenance of the Bethpage switch connection.

In the final analysis, the point is not that the LIRR is precluded from recovering the costs of the switch connection by either an increase in the line haul rates or a separate reasonable maintenance charge,[15] but that it has failed to demonstrate that it currently is undercompensated for these costs. This was the conclusion of the Commission, and we find that there was substantial

evidence in the record to support it. 6/

Accordingly, we grant the application of the plaintiff for a permanent injunction restraining the LIRR from suspending service to the plaintiff's private track because of GMC's refusal to assume the maintenance cost of the switch connection, and it is

SO ORDERED.

Jacob Mishler

U. S. D. J.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

FOOTNOTES

[1] Section 1(9) of the Interstate Commerce Act provides:

> Switch connections and tracks. Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, in application therefor in writing by any shipper or owner of such lateral branch line of railroad, such shipper or owner of such lateral branch line of railroad may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

12 The average annual maintenance cost of the General Motors' switch connection and private siding is $3,266.80 (Exhibit B, Brief of the LIRR Before the Interstate Commerce Commission).

13 Prior to 1954, the practice of the LIRR was to require industries with private sidings to bear the entire maintenance cost of the switch connection. This practice was changed after 1954 in order to maintain a competitive position in the transportation industry. Since 1970, according to the railroad, increasing deficits in the freight service compelled the return to the original practice of requiring industries to bear the entire cost of their private sidings. Compare Allied Container Corp. v. Maine Central R.R.Co., Dkt. No. FD-36143 (Apr. 29, 1976). General Motors claims that in 1965, when the switch connection was built, the parties implicitly agreed to include its maintenance costs in the line haul rates (Sept. 17, 1976, Tr. 27-28). While the line haul rates were not increased at that time, nonetheless there is no evidence that the existing 1965 rates failed to compensate the railroad for the cost of

13 continued

freight operations on the Bethpage tracks, including maintenance of the switch connection. Similarly, there is no reason to believe that the present line-haul rates inadequately compensate the railroad for its entire Bethpage operation, switch connection maintenance included.

14 According to Joseph Remington, a transportation consultant who performed a cost analysis of General Motors' rail traffic from various origins to Bethpage, Long Island:

> [t]he traffic from Michigan and Ohio origins does produce a contribution for the railroads both in a variable cost basis and on a fully allocated cost basis. When the 38 shipments as a whole are considered, the deficits produced by the Martinsburg [West Virginia] traffic so offsets the contribution from the Michigan and Ohio traffic, that the profitability of the traffic to the railroads becomes extremely marginal at best and when considered in light of the costs of maintaining the switch connection and trackage, the value of the traffic to the railroads and LIRR in particular becomes very questionable.

(Brief for L.I.R.R. Before the I.C.C., Remington Affidavit).

However, despite the doubts of Mr. Remington, his analysis does not specifically suggest that the line haul

rates for the Bethpage plant are inadequate to cover operating expenses, including maintenance of the switch connection. Rather, he relies on the overall deficit of the LIRR's freight operations to establish that the LIRR sustains a substantial loss from the GMC freight. It is difficult, however, to understand the relationship between the railroad's entire freight operations deficit and the question of whether the cost of a single switch connection is adequately compensated by the line haul rates. The mere fact that a railroad suffers serious deficits in its freight operations does not entitle it to additional compensation for a switch connection when it is unable to establish that the cost of the connection is not adequately compensated by existing freight rates.

15 GMC also contends that imposition of a maintenance charge by the LIRR "for a service previously included in the carrier's line haul rates can only be construed as an unlawful rate increase in violation of §§1(6) and §6(1)." (Brief After Trial of Plaintiff, at 2.) Inasmuch as we affirm the ICC's conclusion that the LIRR has been unable to demonstrate in the first instance that its line haul

/5 continued

rates provide inadequate compensation for the cost of the switch connection, there is no need to consider the question of whether imposition of maintenance charges pursuant to 49 U.S.C. §1(9) is subject to the publication requirement of 49 U.S.C. §6(1), which requires that a change in rates must be listed with the ICC and kept open for public inspection. See Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U. S. 800, 93 S.Ct. 2367 (1973).

However, as a practical matter, if the LIRR felt that it was entitled to additional compensation for maintenance costs of any of its numerous switch connections, the simplest approach would be to file a rate increase. The shipper, of course, would then be entitled to challenge the proposed new charge. Under this procedure, the burden of proof, if the proposed rate increase is challenged before it goes into effect, would be on the carrier to show that the proposed rate is just and reasonable. 49 U.S.C. §15(7).

Otherwise, the somewhat unusual and time-consuming procedural posture of this case is likely to be repeated.

L5 continued

Parenthetically, our decision in this case applies only to the adequacy of the LIRR's compensation for the Bethpage switch connection, and in no way precludes the railroad from seeking additional compensation, where justified, for its maintenance of other switch connections.

L6 The plaintiff also argues that requiring the railroad to absorb the cost of the switch connection discriminates against smaller shippers that only use public tracks as well as those private-track users who have already agreed to pay additional charges for their switch connection. Again, we emphasize that our decision does not require the railroad to pay for the maintenance of the switch connection; rather, we find that the LIRR has failed to prove that its line haul rates are inadequate to compensate it for the maintenance costs. This may or may not be the situation with respect to the other private track shippers. As to the public track shippers, it may be true that private sidetrack placement is more expensive than public track. Nonetheless, the public track shippers benefit from the private track shipping through reduced

6/ continued

congestion and inconvenience that would exist on the public tracks if private track shipping were diverted there. For these reasons, we reject the argument that GMC's failure to pay the proposed maintenance fee would involve a violation of the Elkins Act, 49 U.S.C. §41 et seq., which forbids unlawful rebates or concessions.

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PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
BEFORE THE
INTERSTATE COMMERCE COMMISSION
DOCKET NO. 36516

IN THE MATTER OF
SWITCH CONNECTION CHARGE
AT BETHPAGE, NEW YORK
--LONG ISLAND RAIL ROAD

VERIFIED STATEMENT OF
WILLIAM E. ANDERSON

On Behalf Of
GENERAL MOTORS CORPORATION

My name is William E. Anderson. I am President of Applied Economics Incorporated, an economic consulting firm. The business address is Suite 1130, 1730 Pennsylvania Avenue, N.W., Washington, D. C. 20006. My qualifications are set forth in Attachment I. Our firm has been retained by the General Motors Corporation to review The Long Island Rail Road Opening Statement presentation in Docket 36516.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

On February 22, 1977, The Long Island Rail Road Company (LIRR) presented its Opening Statement of Facts and Argument and the Verified Statements of four witnesses concerning publication of charges for the maintenance of a private siding switch connection at Bethpage, New York. The switch connection provides rail access to the General Motor Parts Division (GMPD) parts distribution center located on the siding since 1965. The Interstate Commerce Commission (ICC), by an order dated January 26, 1977, instituted an investigation concerning the lawfulness of the published tariff charge and subsequently issued an order in Docket No. 36516 which established modified procedure for the presentation of evidence.

I have been requested by GMPD to review the evidence shown by the LIRR purporting to establish the profitability of the auto parts traffic moving from midwest parts plants to the Bethpage distribution center. This work was also to provide a statement of the railroad revenues and associated costs of the auto parts movements, both to Bethpage and other parts distribution centers covered by the involved rates and located throughout Official Territory. This testimony is divided into five major subheadings as follows:

- LIRR revenue/cost presentation.
- Revenue/cost presentation on Bethpage movements.
- Revenue/cost presentation on Official Territory movements.
- Revenue/cost presentation on nationwide movements.
- Bethpage switch maintenance expense.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

LIRR REVENUE/COST PRESENTATION

LIRR Sampling

Testimony on behalf of the LIRR suggests that a statistical sample of the railroad's 1976 abstract settlements was made to develop the 40-car sample used by Respondents for revenue and cost determinations.[1] The workpapers do indicate that the "Appendix II: 105,000 Random Numbers" tables of the ICC's Guidelines For The Presentation of the Results of Sample Studies were used to identify a 10% sample of the 403 carload universe. However, the LIRR presentation and workpapers provide no indication of the use of stratification, replication or the calculation of standard errors.[2] Since the actual data sampled represents the LIRR abstract file for the year 1976, Protestant has been unable to check even the adequacy of the random number drawings because of the failure to receive any notice of ICC action on its request for cross-examination and access to workpapers held by railroad personnel. However, even if these steps were executed perfectly, the variability of the sampling process can only be demonstrated by statistical calculations as to the existence of various types of sampling error.

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[1] See Verified Statement of Leroy E. Peabody, Jr., page 4.

[2] See ICC's Guidelines for the Presentation of the Results of Sample Studies, pages 3, 5, and 9.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

One method that is available to check the sampling results is a comparison of the sample to available universe data. Such a comparison is shown in Table 1 which comes from the Respondent's workpapers and is based on LIRR data. The universe carloads for the 12 months show a high degree of consistency. The 1976 monthly variation ranges from a low of 6.7% for May to a high of 11.8% for March. The sample data, however, show a variation between zero for December and 17.5% for May, the latter being the very month for which the universe data is lowest. A comparison of the waybill dates for the 40 sample cars also shows a zero percentage for December 1976, with a high of 15% for August 1976. The failure of the sample distributions for these characteristics to relate much more closely to the universe distribution, casts doubt on the adequacy of the sampling process.

The definition of traffic used by the LIRR provides a figure of 403 carloads in the annual universe. GMPD figures for the year 1976, based on shipments containing bill of lading dates in that year, show a total of 408 shipments. The distribution of carloads by origin parts plant is set forth on Table 2 and provides another comparison of sample to universe data. The following marked differences are evident: First, Martinsburg, WV, is overstated in the sample 65.0% to 56.8%. Drayton Plains, MI, however, is understated 7.5% to 14.5%. More importantly,

the outside suppliers, represented by Allied Products at South Bend, IN, and Kelsey Hayes at Olney, PA, are overstated 10.0% to 5.7. These plants are not under the control of GMPD, and movement to distribution centers from these origins is on a more sporadic and as-needed basis. Finally, Table 2 shows that two origins, Toledo, OH and Lansing, MI, were not picked up in the LIRR sample at all. Since the LIRR costing is affected by the routing and junctions involved, the failure to study Toledo, which is a direct Conrail movement to Fresh Pond, tends to understate the weighted average cost presentation.

Table 3 shows a comparison of the LIRR sample revenue per carload by parts plant compared to GMPD 1976 universe data. At three plants, the sample understates the revenue per carload by $31, $28 and $31. These are Flint, MI, Martinsburg, WV, and Pontiac, MI, which accounted for 77.6% of the universe year carloads to Bethpage. At the same time, the sample overstates the comparable figure for Drayton Plains, MI, by $15. The LIRR work did not even pick up the remaining two origins. Again, the significant variation of the Respondent's sample from known universe data for these basic characteristics, coupled with a failure to provide standard error calculations, renders the use of the sample arbitrary.

Bethpage Revenues

Freight and surcharge revenue figures for the LIRR sample were taken off of railroad settlement abstracts. For

each carload these documents contain the waybill date, waybill number, the car initial and number and the billed weight. Comparison of monies actually paid on the involved sample carloads shows an understatement on individual entries. For example, Sample Carload 171, Waybill 153149, dated May 6, 1976, shows on the abstract freight of $364.00 and a surcharge of $45.50. This totals $409.50, the amount of the GMPD prepayment. Comparison with company records indicates that GMPD paid $461.25, based on $410.00 of freight and $51.25 for the 12.5% surcharge. GMPD considers this the appropriate rate level following the March 21, 1976, rate increase. A review of the 40-car sample shows 10 instances, or 25% of the entire number of sample movements, where GMPD paid a higher charge than was reflected on the settlement abstracts. There appear to be no instances where GMPD paid less. The revenue summarized in the LIRR presentation appears to be significantly in error and understated.

Tare Weight and Empty Return

In pricing Bethpage traffic, the LIRR used a tare weight of 36.0 tons per car, adopted from the 1974 ICC Cost Scales. This figure represents a box-general service equipped car. While this is the predominant general car type in replacement parts service, the LIRR did have available the car initials and numbers from its own 40-car sample. While the sample was used to develop routings, revenue, per diem and other characteristics, it was not used for the development of the tare weight applicable to the involved rail cars.

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Based on the latest Association of American Railroads car fleet data, a weighted average tare weight of the 33.16 tons can be calculated. This lower result from the national average figure used by the LIRR is affected by the presence of differing car types. Also, 15% of the sample cars are "free runners" as opposed to assigned pool cars. Almost all of the GMPD parts plants have assigned pool cars, but the size of these fleets has been cut back to a point that carloadings require the use of non-pool cars. The Bethpage sample is not unique in that respect. The appropriate tare weight is some three tons less than the general average data utilized in the LIRR presentation, which resulted in an overstatement of the cost of service.

Related to the LIRR treatment of tare weight is the assumption of 100% empty return for all auto parts traffic. This was apparently based on the existence of assigned pool cars which the railroads are required to return to the GMPD parts plants in Michigan, Ohio and West Virginia. The LIRR data, however, shows that "free runners" are used and six of the railroad's 40-car sample were in this category. These include both box-general service unequipped cars and box-general service equipped cars. Applying the latest ICC Region II empty return factors of .59 and .86 respectively for these cars yields a weighted average empty return of .965. While return loads may not be available on the LIRR, clearly as "free runners" they are available for reloading

after being returned to Conrail. Recent evidence indicates the use of non-pool cars for carloadings out of the Martinsburg, WV, parts plant is ranging between 18% and 20%.[1] Thus, the true overall empty return experience may well be lower than the 40 sample car calculated average. In any case, the use of 100% empty return in the LIRR presentation represents an overstatement of costs for the involved traffic.

LIRR Train Operations

The Verified Statement of Charles W. Powers describes the LIRR operation from Fresh Pond Jct. to Bethpage and back. A study of these specific operations has been used to adjust the average LIRR 1975 Rail Form A unit costs to determine the terminating train expenses. This study was based on a judgment sample covering the first 10 trip operations of the involved trains in the year 1977. While a 10% random sample of carloads spread throughout the year 1976 was used to develop selected basic traffic characteristics, a 10 trip sample covering essentially the first two weeks of 1977 was used to study operations. This represents, in effect, a 3.8% judgment sample. For 3 of the 5 trains studied, RF 16, RF 11, and RF 64, only the number of cars handled appears on the workpapers. The calculated train tonnage is predicated on estimates of average tare and average lading for unspecified commodities. The workpapers made available to Protestant on this study really constitute merely a 2-page

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[1]See Verified Statement of Harold A. Stater, page 6.

summary of that entire analysis, and the LIRR figures do not support the Table 2 data shown by Witness Peabody at page 6. Again, because the Protestant did not receive an answer to its request for cross-examination and access to workpapers held by the LIRR, it was not possible to verify (1) that the study summary results properly reflect the operating records on which they are purported to be based or (2) to check that the first 10 trips of 1977 constitute an appropriate representation for a year's operation.

Bethpage Switching

No study was made of the switching operation at the Bethpage distribution center to determine the proper assignable expense for auto parts traffic -- either a limited random sample or even a judgment sample. Rather, the LIRR 1975 system average switching cost of $138.87 per carload was utilized. This carrier average compares with $38.91 per carload for the Official Territory, Region II 1974 average. Indexed to a common base of July 1976, these figures are: LIRR $149.98, Region II $46.69.[1] The LIRR switching cost then is 221% higher than the comparable Official Territory cost, and the latter is predicated, in part, on LIRR expenses.

The use of the average switching cost parallels the LIRR treatment of tare weight. Again the required data for study is contained in their files. Witness Donald M. Kadel of the LIRR testified, in Docket 35790, General Motors Corporation vs. The Long Island Rail Road, that the switching

[1] LIRR indexed Region II Costs - 1.20; LIRR Costs - 1.08

required to handle 4 loads in and 4 empties out was 45 minutes. The use of 4 carloads apparently refers to the track capacity within the distribution center building; however, there is room for additional rail cars on GM property between the building and the fence.

Through examination of daily reports of the rail cars consigned to the Bethpage facility, together with car records maintained by GMPD in the usual course of business, it can be determined on which particular day any given car is spotted on the sidetrack, and on which particular day any given car is removed. An analysis of these records was made to determine the provision of switching services at Bethpage. Based upon the sequence of rail cars to and from the sidetrack during the calendar year 1976, a daily log was constructed of the inventory of cars handled, including identification of cars remaining on the track from the preceding day, newly arrived loads, released empties, and cars on hand at the close of the business day.

Because of the limited sidetrack capacity at Bethpage, the order in which loaded rail cars are made empty and released to the carrier is critical in measuring the complexity and cost of conducting switching operations. It is GMPD's general practice at Bethpage to unload the car or cars closest to the switch connection first. Thus, if all newly arrived cars cannot be unloaded prior to the next switch out, the empty cars can be pulled without the necessity of first

pulling a loaded car and later repositioning it. There are occasions, however, when subsequent deliveries of loaded cars are made at Bethpage prior to the unloading of cars that were placed on preceding days. In Docket 35790, Witness Kadel said, "However, if any of the cars on the siding are not empty and have to be respotted along with placement of the loaded cars, the switching time would have to be doubled to 90 minutes."

By analyzing the switching activity, both inbound loads and outbound empties, and the inventory of cars both at the beginning and at the end of each of the 366 days in calendar year 1976, it was determined that there were 144 days on which the Bethpage facility was accorded switching not necessitating the repositioning of any cars. There were, however, 42 days on which one or more empty cars waiting to be switched out by the arriving LIRR crew were blocked by loaded cars. Application of 45 and 90 minutes, respectively, to the 144 and 42 days on which switching actually occurred, results in 10,260 total switching minutes applicable to the single locomotive unit which powers train RF 64.[1]

By applying 10,260 minutes to the 408 loaded cars handled, and increasing this for non-productive time, a figure of 30.1 minutes per loaded car is obtained. The Rail Form A embracing LIRR's 1975 operation shows 37.2 minutes

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[1]See Verified Statement of Leroy E. Peabody, Jr., page 6.

for this function. This Bethpage switching minutes consume only 80.9% of the carrier's average industry switching. The uniqueness of rail operations on the LIRR can be demonstrated by contrasting the 37.2 minutes per car with the most recently released Region II (Official Territory, excluding New England) average of 27.8 minutes per car. Clearly, the use by the LIRR of its high system average, as opposed to a study of the actual switching operation at Bethpage, overstates the cost of handling auto parts traffic.

LIRR Car Costs

Per diem and mileage rates for the LIRR 40-car sample were used to establish that carrier's car cost since it owns no freight cars. Essentially, the days on-line, Fresh Pond Jct. to Bethpage to Fresh Pond Jct., were determined by individual car, as well as the mileage for which payment was also made. Protestants Table 4 sets forth these average per diem costs and shows a series of three adjustments. First, for Martinsburg, WV, and Pontiac, MI, cars, errors in calculating the individual car data were found. Also, since costs are being indexed to July 1976[1] and the per diem and mileage charges on some sample cars were reclassified by July 1976 (due to previous erroneous assignment of age), further recalculations of car cost were made. The second adjustment arises from the testimony of William Burke, in

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[1]See Verified Statement of Leroy E. Peabody, Jr., page 10.

his Verified Statement, page 7, where he notes that on 70 occasions in 1976, LIRR did not switch available empty cars out, resulting in 161 additional per diem days. On the 408 total cars moving into Bethpage in the year, this represents an average of .39 excess per diem days per car. Column 3 of Table 4 shows LIRR car costs adjusted for these days, which arose from carrier convenience. While this may have been prudent operations for the LIRR, it should not result in a charge against Bethpage. Finally, in 1976, GMPD paid demurrage charges at Bethpage of $1,410.00, even though it does have an averaging agreement. On the total 408 cars this represents an income of $3.46 per unit, which offsets LIRR overall car costs. Assuming that the sample results are representative, the average days built into the cost figures include those on which demurrage payments were made. Thus, these GMPD payments should be considered offsets to the projected car costs. As set forth in Table 4, the weighted average car expense for the LIRR should be $24.77 per carload, or 19% lower than the costs used in the LIRR presentation.

General Costing Techniques

There exist additional areas of cost overstatement due to the application of general costing techniques which do not apply to the auto parts traffic. First, the LIRR presentation, as a part of the terminal cost, makes a unit cost per carload charge for special services. As set forth

by the ICC in Rail Carload Cost Scales 1974 (page 134), the most recent publication, these expenses cover cleaning cars, removing dunnage, furnishing grain doors, bedding livestock, coopering cars and closing doors on hopper cars. The Verified Statement of Harold A. Stater, page 6, indicates that these services are not provided. Similarly, a loss and damage charge of $6.51 per carload, subsequently indexed for cost escalation to July 1976, is made for each carload. In 1976, there were no loss and damage claims by Bethpage. For all of the GMPD parts plants, loss and damage claims in 1976 were $2,274.72 on 164,792 tons, or 1.38035 cents per ton. Actually, these claims against the rail carriers occurred only at 3 locations as follows:

Flint, MI	1.75719 cents per ton
Grand Blanc, MI	7.45855 cents per ton
Detroit, MI	13.23911 cents per ton

In addition to applying loss and damage expense when it was not involved for Bethpage, a carload charge was also made for the related claims clerical work.

For the connecting Official Territory carriers providing service between the origin parts plants in Michigan, Ohio and West Virginia, the LIRR pricing also overstates the cost of handling auto parts. For a car detention cost at the origin terminal, a Region II average cost of $24.58, in 1974 dollars, was applied. This, however, is predicated on two days of loading time. The involved parts plants are

given only one day for loading prior to paying demurrage penalties, which exceed the average car costs per day. Also, as detailed in Witness Stater's Verified Statement, page 6, upon calling for an empty car, GMPD loads within one or two workshifts, or less than 24 hours. The LIRR also assumes territorial average switching time at the parts plants. For Region II, this represents some 13.9 minutes per car, loaded or empty. Table 5 shows the total rail carloads handled in and out of each of the GMPD parts plants in 1976. At Martinsburg, WV, for example, which originated 56.8% of all carloads destined to Bethpage in 1976, an average of 9.2 cars/day was handled inbound (2,302 ÷ 250) and 22.7 cars handled outbound (5,664 ÷ 250). At 13.9 minutes per car, this represents 443 switching minutes per 24 hours or 7.4 hours out of every day for the origin carrier to switch this one plant. The magnitude of this figure clearly raises doubt about the appropriateness of such a territorial average.

The impact of an average costing treatment for the connecting carriers also appears in line-haul costs. In the Verified Statement of Leroy E. Peabody, Jr., on Table 1, page 5, the routing and mileages for 7 sample origins is laid out. For South Bend, IN, the data show: NJII (11) - PINE - NW(420) - BUFFALO-CONRAIL(446) - FP - LIRR(33). While an interchange is not assigned for Fresh Pond Jct., the workpapers do show 2 interchanges being charged to the connecting carriers, presumably for PINE and BUFFALO. The NJII is not

a Class I carrier, but rather a Class II line wholly owned and operated by the Norfolk & Western (N&W). This is N&W's only entry into South Bend, IN, from its main line between Toledo, OH, and Chicago, IL. The LIRR would assign 22.5 miles of way train service, double the entire length of the NJII, and a full interchange for 2 carriers, even though it constitutes a function similar to a way train origination.

Out of only 7 different routings for the LIRR 40-car sample, there are 2 routings, for 3 carloads, from Kelsey-Hayes at Olney, PA. This origin accounted for less than 5% of the entire 1976 traffic to Bethpage. One routing, which was used prior to April 1, 1976, shows a Reading origination with an interchange to the Conrail (Penn Central) at Belmont. While historically factual, the creation of Conrail represents a permanent institutional change that eliminates the interchange. This is demonstrated by the second routing with the same mileage of 385 between Olney, PA, and Fresh Pond Jct., but shows no junction. The treatment accorded the costing of the connecting carriers, even accepting the use of average unit costs, should not be based on work units which are unrealistic.

In summary, the review of the LIRR revenue/cost presentation notes specific deficiencies in Respondent's sampling results, especially the development of the revenue. In addition, the treatment and method of pricing outlines a pattern of overinflation of costs which renders any final revenue/cost comparisons inadequate, when based on these data and studies.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
REVENUE/COST PRESENTATION ON BETHPAGE MOVEMENTS

The LIRR development of costs included the application of Rail Form A to that carrier's 1975 accounts to generate the initial unit costs to be applied against some 33 miles of movement. For the connecting carriers, responsible for origin and bridge service to Fresh Pond Jct., ranging from 385 miles to 877 miles, territorial average costs for Region II have been used. These costs represent 25 Official Territory railroads, ranging from the Penn Central to the Monogahela Railway, and indeed, including the LIRR itself. The involved routings set forth in Table 1 of the Verified Statement of Leroy E. Peabody, Jr., however, show only 4 carriers of Class I magnitude, namely Conrail (CR), Grand Trunk Western (GTW), Canadian National (CN) and Norfolk & Western (N&W). Even had Respondent's sampling picked up the origins of Toledo, OH, and Lansing, MI., it would have added no other large carriers. The failure to make Rail Form A applications for the specific connecting line carriers to develop unit costs for a dominant part of the haul renders the entire presentation questionable, especially when such a limited group of carriers is involved.

This unequal treatment of specific carrier unit costs versus territorial average unit costs is further heightened when actual comparisons are made. Table 6 shows, at a common level of July 1976, selected unit costs for Region II versus the LIRR. Only, in train supplies and ex-

penses per car does the LIRR cost exceed that shown for Region II. Other categories of expense show substantially higher figures for the LIRR. While some of the variation may well result from the unique physical characteristics of the LIRR, e.g. short average haul, it can only be characterized as an extremely expensive freight operation. Thus, while experiencing a 64% increase in freight revenue between 1973 and 1975 ($9.462M to $15.524M), the net loss on freight service reached $14.203M in 1975. Without a complete demonstration as to the appropriateness of the causes of such expense magnitudes, the use of the LIRR 1975 Rail Form unit costs is unwarranted.

Without Rail Form A costs for the connecting carriers, without comparable operating information to adjust the average costs for the entire haul, and without justification of the LIRR expenses reported in its accounts for 1975, the appropriate showing of the revenue/cost relationship for the rates on auto parts lies in using Region II unit costs from origin to destination. This demonstration has been done based upon the average lading, routing and mileages set forth in Table 7. These data cover all 1976 origins for movements from parts plants to Bethpage and are based, where possible, on complete annual data rather than a sample. This pricing is also based on the following factors:

- Average tare of 33.16 tons and empty return of .986 from the LIRR sample.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

- Adjustment of origin car costs to reflect one day for loading.
- Adjustment of Bethpage switching cost to reflect special study minutes per car.
- Deletion of unit costs which are not applicable, e.g. special services, loss, damage and claims clerical.

All unit costs have been indexed up to July 1976.

No showing has been made on the relative cost and relative revenue between LIRR on one hand and the Official Territory connecting carriers on the other hand. First, GMPD has no role to play in the issue of revenue divisions between the carriers since this is entirely up to the carriers themselves or the ICC. Second, a most critical assumption in such a comparison is that the revenue split shown as between the LIRR and the connecting carriers is itself proper. Table 8 compares the relative mileage and revenue for the LIRR as it relates to total mileage and revenue. While mileage is certainly not the sole determinant of rail divisions, it does provide one guideline on general reasonableness. These data show that while LIRR mileage varies between a low of 3.6% and a high of 7.9%, its proportion of total revenue ranges from 35.0% to 62.0%. At Martinsburg, WV, which shipped well over half of the total carloads consigned to Bethpage in 1976, the LIRR gets 48.8% of the revenue on 33 miles out of a haul of 590 miles. Clearly, no assumptions can be made concerning the reasonableness of the

carrier divisions in this instance. Thus, any demonstration of relative contribution for one carrier or group of carriers is improper.

The results of this pricing for the through movement from origin to destination are shown on Table 9. The total variable cost per carload ranges from $418 for Olney, PA, to $725 for South Bend, IN. The revenue shown represents the effective rate levels for July 1976. This is the time period to which all costs have been indexed; thus, costs and revenues are at a comparable level. The LIRR presentation also indexed all costs to July 1976. The ratios of revenue to cost indicate that 9 out of the 11 movements show revenue contribution above variable cost. Those origins which do not are movements where the circuity in the present operation constitutes a significant element. For example, the short line rail distance between Olney, PA, and New York City is some 91 miles. This represents the rate making mileage involved. The rail haul to Selkirk, NY, and back down to Fresh Pond Jct., however, is a total of 368 miles, a circuity factor of 304%.

The average lading from each of the 11 origins ranges from 2.66 tons per car from the Flint, MI, Plant 02 to 7.95 tons for Martinsburg, WV. None has a yearly average exceeding 20M pounds, the minimum billing weight. However, there are shipments throughout the year which move at tonnage in excess of 200 cwt. The workpapers to the LIRR 40-car

sample show 6 instances or 15% of the time, when this took place. While the average lading over the year can be less than 10.0 tons, the average revenue per car actually may exceed the amount of the minimum rate times 200. This is reflected in Table 3 discussed earlier. To reflect the actual billing as applicable, the revenue at the July 1976 level has been recalculated based on the 1976 experience of revenue per car paid in excess of the minimum. A comparison of the restated revenue to variable cost ratios is contained in Table 10. There were revenue increases at 6 of the 11 parts plants which originated traffic to Bethpage in 1976, and the contribution ratios for these locations increased. The number of movements showing revenue contribution above variable cost remained the same. However, the Martinsburg, WV, ratio shifted from .8969 to .9844.

In summary, the pricing of the 1976 Bethpage traffic, using Official Territory Region II costs on the through movement, shows that all but two origin parts plants make a revenue contribution above variable cost. When the revenue per car is adjusted to reflect the 1976 experience for carloads above the 20M proved minimum weight, only the revenue:cost ratio for Kelsey Hayes at Olney, PA (an outside supplier) is significantly below a positive contribution.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
REVENUE/COST PRESENTATION ON OFFICIAL TERRITORY MOVEMENTS

The LIRR is in the unique position compared to the other carriers involved in the movement of auto parts from GMPD parts plants to parts distribution centers. It participates in only one movement, namely Fresh Pond Jct. to Bethpage. As shown on Table 5, there are 11 GMPD parts plants which loaded 19,494 carloads in 1976 to 26 parts distribution centers throughout the nation, including Bethpage. The top 6 of these parts plants accounted for 16,014, or 82%, of all carloads.

Table 11 shows the 11 parts plants and their 1976 shipments to the 12 parts distribution centers, exclusive of Bethpage, located in Official Territory. These destinations accounted for 7,025 carloads in 1976 and represent a geographic spread from Boston, MA, to Chicago, IL, to St. Louis, MO, to Richmond, VA. The rate structure governing the movements from these midwest parts plants to Bethpage also determines the rates to the 12 distribution center destinations.

Tables 12 to 17 provide the 1976 average lading, the routing and the mileages for the 6 dominant origins to all of the Official Territory parts distribution centers. The routings show that, except for the LIRR, the 4 Class I size carriers handling Bethpage traffic also participate in other GMPD movements. The variable cost per car has been calculated using the data in these tables, the ICC Region II Rail Form A

unit costs, and the other applicable factors and adjustments set forth earlier for the pricing of Bethpage. The cost per carload is compared to the July 1976 revenue for each movement in Table 18, along with the ratio of revenue to cost. There is a contribution above variable cost in 62 out of 65 movements involved. These ratios vary from 1.0119 for Grand Blanc, MI, to Chicago, IL, to 1.4774 for Toledo, OH, to Pittsburgh, PA. Since these movements are from volume producing points to major consuming locations, as opposed to small cities and hamlets in rural parts of Official Territory, it is clear that adjustments to the average costing utilized in this presentation would tend to lower the overall cost. Further, adjusting the July 1976 revenue level for the actual experience of loadings exceeding the 20M pound minimum would also increase the total revenue per car, thus raising the revenue contributions already shown.

Table 18 demonstrates that the rate structure governing the revenue for the movement of vehicle body parts and accessories over the entire Official Territory provides rail carriers with revenue contribution above variable costs in almost all of the movements studied.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
REVENUE/COST PRESENTATION ON NATIONWIDE MOVEMENTS

The auto parts from the 11 GMPD parts plants in Michigan, Ohio and Indiana move to distribution centers over the entire United States. The revenues generated by these shipments are covered in the data published by the Department of Transportation in its 1975 Carload Waybill Statistics shown in Table 19. Figures for total carload traffic are compared to movements for motor vehicle body parts (37147) and motor vehicle accessories (37149), the predominant traffic moving to Bethpage. The Official to Official comparisons show a per car revenue on body parts of $632 and on accessories of $744 compared to a total carload traffic revenue of $492. The same relationships exist whether the comparison is made on a per car, per cwt. or per ton-mile basis. While the higher figures for auto parts traffic continue to exist when comparisons are made for Official to South, it does not extend to Official to Western Trunk Line, Southwestern or Mountain-Pacific movements on a per car basis. However, the pattern is entirely consistent on per cwt. and per ton-mile comparative bases. Overall, the revenue received by the Official Territory railroads on auto parts traffic is significantly higher than on average traffic.

While it is demonstrable that revenue for auto parts traffic is high, the issue of its profitability represents another characteristic for comparison. Here, the ICC Rail Revenue Contribution series, referred to as the Burden Study,

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provides the relevant data. Table 20 shows the 1972 revenue to variable and fully allocated cost ratios for total carload traffic, body parts (37147) and accessories (37149). These are the most recent data available. For all of United States to United States movements, body parts exceeded general traffic by 7.2% at a variable cost level and 24.4% at the fully allocated. The motor vehicle accessories show increases over average traffic of 14.8% and 30.2% respectively. A comparison of Official to Official movements shows a basically similar pattern favoring auto parts and accessories, but with total carload traffic having a ratio of 95.6%, namely revenue failing to equal cost. For Official to West traffic, the ratio of revenue to variable cost is slightly greater for total carload traffic, but the ratio at the fully allocated cost level again shows auto body parts and accessories slightly higher. A review of the table confirms that auto parts traffic not only generates high revenue, but also makes a significant contribution at either level of cost.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

BETHPAGE SWITCH MAINTENANCE EXPENSES

The Verified Statement of Charles H. Gaut outlines the development of the LIRR maintenance expenditures for the switch connection leading to the GMPD Bethpage distribution center. The annual cost is given down to the dollar, on page 2, as $1,808. However, the page 1 testimony clearly denotes the entire calculation as "the estimated annual cost" and the subsequent statement that, "The foregoing construction costs are based upon current wages and prices," supports this characterization. It is not explained as to why the determination must be an estimate, since it is standard practice for Class I carriers to prepare "AFE" documentation (Authority For Expenditure), with respect to additions of property. Further, the estimated cost of construction is put at $30,400 for the switch connection (material and labor) and labeled "Total depreciable construction cost." The Annual Report Form for railroads indicates in Schedule 322, Road Property-Depreciation, that track accounts, (8) ties, (9) rails, (10) other track material, (11) ballast and (12) track laying and surfacing, are excluded from that schedule. These are the very accounts that are involved for the expenditures cited above.

Based on the description, in the Verified Statement of Leroy E. Peabody, Jr., of the methodology underlying the Rail Form A application to the LIRR 1975 accounts, it appears that the expenses to maintain the switch, i.e., the estimated

$600 for inspection, lubrication and snow removal, as well as the estimated $600 cost of general switch maintenance, are being covered in the input expense accounts. For example, the general switch maintenance is chargeable to the carrier's Maintenance of Way and Structure accounts, the so-called 200 series. Also, such charges are contained in the expense inputs to the ICC Region II Rail Form A, which is predicated, in part, on the LIRR.

The estimated figure of $1,808 as the yearly maintenance, inspection and general depreciation switch cost is apparently an update of the figure of $3,266.80, which was the average annual maintenance cost of the GMPD switch connection and private siding, contained in Exhibit B of the LIRR brief before the ICC in Docket 35790. The LIRR current presentation makes no reconciliation of these figures. Finally, because Protestant did not receive notification of the ICC action on its request for cross-examination and access to workpapers, including those supporting the Verified Statement of Charles H. Gaut, there has been no opportunity to review such underlying material as may exist.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT
VERIFICATION

DISTRICT OF COLUMBIA) SS

WILLIAM E. ANDERSON, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

William E. Anderson
William E. Anderson

Subscribed and sworn to before me this 14
day of April, 1977.

Notary Public
My Commission Expires November 14, 1979

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

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Table 1

COMPARISON OF UNIVERSE AND SAMPLE DATA:[1] SETTLEMENT DATES

	Universe		Sample	
Month	Carloads	Per Cent	Carloads	Per Cent
January	37	9.2	1	2.5
February	39	9.7	3	7.5
March	47	11.8	5	12.5
April	28	6.9	1	2.5
May	27	6.7	7	17.5
June	28	6.9	3	7.5
July	32	7.9	3	7.5
August	30	7.4	6	15.0
September	31	7.7	4	10.0
October	41	10.2	2	5.0
November	36	8.9	5	12.5
December	27	6.7	0	0.0
Total	403	100.0	40	100.0

[1] LIRR Workpapers

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 2

COMPARISON OF UNIVERSE AND SAMPLE DATA: CARLOADS

Parts Plant	GMPD 1976 DATA Carloads	GMPD 1976 DATA Per Cent	LIRR SAMPLE[2] Carloads	LIRR SAMPLE[2] Per Cent
Flint, MI:	34	8.3	2	5.0
Plant 01	22	5.4		
Plant 02	1	.2		
Plant 80	8	2.0		
Plant 81	3	.7		
Martinsburg, WV	232	56.8	26	65.0
Toledo, OH	8	2.0	0	0.0
Pontiac, MI	51	12.5	5	12.5
Lansing, MI	1	.2	0	0.0
Drayton Plains, MI[1]	59	14.5	3	7.5
South Bend, IN	4	1.0	1	2.5
Olney, PA	19	4.7	3	7.5
Total	408	100.0	40	100.0

[1]Waterford.

[2]Verified Statement of Leroy E. Peabody, Jr., Table 1, page 5.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 3

COMPARISON OF UNIVERSE AND SAMPLE DATA: REVENUE PER CARLOAD

Parts Plant	GMPD 1976 Data	LIRR Sample[3]
Flint, MI:	$ 740	$ 709
Plant 01	761	
Plant 02	727	
Plant 80	680	
Plant 81	745	
Martinsburg, WV	471	443
Toledo, OH	679	XXX 1
Pontiac, MI	710	679
Lansing, MI	630	XXX 1
Drayton Plains, MI[2]	733	748

[1]Not selected into sample

[2]Waterford

[3]Verified Statement of Leroy E. Peabody, Jr., Table 3, page 7

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 4

ANALYSIS OF LIRR CAR COSTS (PER DIEM)

		Adjustments		
	LIRR Sample[1]	Errors & Reclassification	Excess Per Diem Days	Credit For Demurrage
Martinsburg, WV	$ 28.89	$ 28.91	$ 27.34	$ 23.88
Pontiac, MI	38.43	32.61	30.85	27.39
Drayton Plains, MI[2]	26.53	26.53	25.36	21.90
Flint, MI	30.71	30.71	29.56	26.10
Olney, PA(CR)	25.12	25.12	23.60	20.14
Olney, PA(RDG)	41.12	35.85	34.74	31.28
South Bend, IN	48.11	48.11	46.82	43.36
Weighted Average	$ 30.59	$ 29.75	$ 28.23	$ 24.77

[1] Verified Statement of Leroy E. Peabody, Jr., Table 4, page 10

[2] Waterford

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 5

1976 GMPD TRAFFIC: TOTAL AT PARTS PLANTS

Parts Plants	Inbound Carloads	Outbound Carloads	Total
Flint, MI 01 & 02	1,641	5,110	6,751
Martinsburg, WV	2,302	5,664	7,966
Toledo, OH	1,498	1,846	3,344
Grand Blanc, MI	619	1,458	2,077
Pontiac, MI	805	1,936	2,741
Lansing, MI	168	274	442
Detroit, MI	541	541	1,082
Drayton Plains, MI	794	2,371	3,165
S & V 1 & 2; Flint, MI	155	294	449
Total	8,523	19,494	28,017

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 6

COMPARISON OF RAIL FORM A UNIT COSTS: LIRR VS. ICC REGION II

	ICC Region II		LIRR	
	Year 1974	July 1976	Year 1975	July 1976
Cost Per Revenue and Non-revenue GTM	0.14746¢	0.17695¢	2.21305¢	2.3900[illegible]
Cost Per Locomotive Unit-mile	$ 0.97180	$ 1.16616	$ 5.52703	$ 5.9691[illegible]
Crew Cost Per Train-mile	$ 4.09548	$ 4.91458	$ 7.83152	$ 8.4580[illegible]
Other Cost Per Train-mile	$ 1.05335	$ 1.26402	$ 4.36125	$ 4.7101[illegible]
Train Supplies and Expenses Per Train-mile	0.47541¢	0.57049¢	3.89791¢	4.2097[illegible]
Car Inspection Per Car-mile	0.85385¢	1.02462¢	8.99036¢	9.7095[illegible]
Inter & Intra-train Switch Cost Per Car (load or empty)	$ 5.64209	$ 6.77051	$20.13606	$21.7469[illegible]
Switch Cost Per Car (load or empty) Road train to Industry	$19.45540	$23.34648	$69.43483	$74.9896[illegible]
Station Clerical Per Car	$ 5.00626	$ 6.00751	$12.34006	$13.3272[illegible]
Train Supplies and Expenses Per Car	$ 2.12388	$ 2.54866	$ 1.33525	$ 1.4420[illegible]

Table 7

AVERAGE LOAD AND ROUTE OF MOVEMENT: PARTS PLANTS TO BETHPAGE DISTRIBUTION CENTER

Parts Plant	Tons Per Car	Routing and Miles
int, MI 01	6.75	GTW(63.4) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
int, MI 02	2.66	GTW(63.4) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
rtinsburg, WV	7.95	CR(557) - FPONJ - LIRR(32.6)
ledo, OH	6.28	CR(740) - FPONJ - LIRR(32.6)
ntiac, MI	6.52	GTW(55.7) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
nsing, MI	3.31	GTW(112.5) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
ayton Plains, MI	6.29	GTW(60.5) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ - LIRR(32.6)
V 1, Flint, MI	4.17	GTW(63.4) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
V 2, Flint, MI	4.27	GRW(63.4) - PTHUR - CN(189) - BUFF-CR(446) - FPONJ-LIRR(32.6)
, South Bend, IN	5.63[1]	NJII(11.4) - PINE - NW(420) - BUFF-CR(446) - FPONJ-LIRR (32.6)
, Olney, PA	6.50[1]	CR(368) - FPONJ - LIRR(32.6)

[1]LIRR Workpapers

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 8

COMPARISON OF MILEAGE AND REVENUE:
LIRR VS. CONNECTING CARRIERS

Origin	Mileage			Revenue		
	Total	LIRR	Per Cent	Total	LIRR	Per Cen
Martinsburg, WV	590	33	5.6	$ 443	$ 216	48.8
Pontiac, MI	724	33	4.6	679	246	36.2
Drayton Plains, MI[1]	731	33	4.5	748	268	35.8
Flint, MI	731	33	4.5	709	250	35.3
Olney Station, PA	418	33	7.9	305	189	62.0
Olney, PA	418	33	7.9	234	145	62.0
South Bend, IN	910	33	3.6	583	204	35.0

[1] Waterford

Source: Verified Statement of Leroy E. Peabody, Jr., Table 1, page 5 and Table 3, page 7

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 9

COMPARISON OF PER CARLOAD VARIABLE COST AND REVENUE ON BETHPAGE MOVEMENTS

Parts Plant	Cost	Revenue	Ratio
Flint, MI 01	$ 699	$ 727	1.0401
Flint, MI 02	691	727	1.0521
Martinsburg, WV	514	461	.8969
Toledo, OH	600	734	1.2233
Pontiac, MI	700	727	1.0386
Lansing, MI	718	758	1.0557
Drayton Plains, MI	702	727	1.0356
S & V 1, Flint, MI	696	727	1.0445
S & V 2, Flint, MI	696	727	1.0445
A P, South Bend, IN	725	814	1.1228
K-H, Olney, PA	418	322	.7703

Note: Revenue per July 1976 rates

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 10

COMPARISON OF PER CARLOAD VARIABLE COST AND REVENUE ON BETHPAGE MOVEMENTS

Parts Plant	Cost	Revenue	Ratio
Flint, MI 01	$ 699	$ 810	1.1588
Flint, MI 02	691	727	1.0521
Martinsburg, WV	514	506	.9844
Toledo, OH	600	734	1.2233
Pontiac, MI	700	764	1.0914
Lansing, MI	718	758	1.0557
Drayton Plains, Mi	702	788	1.1225
S & V 1, Flint, MI	696	731	1.0503
S & V 2, Flint, MI	696	801	1.1509
A P, South Bend, IN	725	814	1.1228
K-H, Olney, PA	418	322	.7703

Note: Revenue per July 1976 rates and 1976 loading experience

Table 11

1976 GMPD CARLOAD TRAFFIC: PARTS PLANTS TO SELECTED PARTS DISTRIBUTION CENTERS

St. Louis MO	Cincinnati OH	Chicago IL	Buffalo NY	Pittsburgh PA	Baltimore MD	Philadelphia PA	Louisville KY	Cleveland OH	Boston MA	Newark NY	Richmond VA	TOTAL
526	52	90	176	207	515	256	0	1	261	193	150	2,447
86	145	271	10	12	56	26	84	71	26	25	9	821
149	95	254	12	0	153	42	25	41	80	72	14	937
126	85	191	21	28	125	51	21	30	59	49	20	796
68	123	294	0	3	58	6	44	46	13	0	0	655
61	109	158	0	0	45	1	41	32	36	49	0	532
48	97	178	0	0	59	1	44	35	13	10	1	486
16	7	74	0	0	41	1	0	0	2	48	0	189
17	3	28	0	3	6	1	0	1	3	0	0	62
13	0	25	0	0	10	5	0	0	4	0	0	57
3	4	14	4	3	4	3	0	4	4	0	0	43
1,113	720	1,567	223	256	1,072	393	259	261	521	446	194	7,025

Table 12

AVERAGE LOAD AND ROUTE OF MOVEMENT: MARTINSBURG, WV TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, MO	9.91	BO(795.1)
Cincinnati, OH	9.78	BO(462.0)
Chicago, IL	9.35	BO(701) - BLUIS - IHB(19)
Buffalo, NY	8.05	BO(492.1)
Pittsburgh, PA	7.89	BO(224.7) - BRUCE - NW(13)
Baltimore, MD	9.88	BO(96.4)
Philadelphia, PA	8.37	BO(66.7) - LURGA - CR (160.8)
Louisville, KY	[1]	XXXX
Cleveland, OH	7.14	BO(383.2)
Boston, MA	8.57	CR(502)
Newark, NJ	13.04	BO(66.7) - LURGA - CR(240.8)
Richmond, VA	9.66	BO(90.3) - POTYD - CO(163)

[1] No traffic in 1976

Table 13

AVERAGE LOAD AND ROUTE OF MOVEMENT: FLINT, MI TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, MO	10.71	GTW(270.4) - CNGO - NW(306)
Cincinnati, OH	10.25	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - CR(212)
Chicago, IL	11.50	GTW(250.9) - BLUIS - IHB(19)
Buffalo, NY	8.19	GTW(63.4) - PTHUR - CN(189)
Pittsburgh, PA	8.71	GTW(83.5) - DET - NW(310)
Baltimore, MD	9.66	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - BO(609.0)
Philadelphia, PA	7.04	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - BO(705.7)
Louisville, KY	10.94	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - BO(329.0)
Cleveland, OH	7.52	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - BO(183.7)
Boston, MA	5.68	GTW(63.4) - PTHUR - CN(189) - BUFF - CR(499)
Newark, NJ	11.64	GTW(63.4) - PTHUR - CN(189) - BUFF - CR(444)
Richmond, VA	8.64	GTW(83.5) - DET[1]- DTSL(59.0) - TOLED - CO(637)

[1]Run - through trains GTW - DTSL

Table 14

AVERAGE LOAD AND ROUTE OF MOVEMENT: DRAYTON PLAINS, MI TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, MO	6.33	GTW(289.7) - CHGO - NW(306)
Cincinnati, OH	5.60	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - CR(212)
Chicago, IL	6.66	GTW(269.4) - BLUIS - IHB(19)
Buffalo, NY	5.32	GTW(60.5) PTHUR - CN(189)
Pittsburgh, PA	[2]	XXXXX
Baltimore, MD	7.03	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - BO(609.0)
Philadelphia, PA	7.01	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - BO(705.7)
Louisville, KY	6.30	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - BO(329.0)
Cleveland, OH	7.01	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - BO(183.7)
Boston, MA	5.92	GTW(60.5) - PTHUR - CN(180) - BUFF - CR(499)
Newark, NJ	9.48	GTW(60.5) - PTHUR - CN(189) BUFF - CR(444)
Richmond, VA	5.61	GTW(30.9) - DET[1]- DTSL(59.0) - TOLED - CO(687)

[1]Run - through trains GTW-DTSL

[2]No traffic in 1976

Table 15

AVERAGE LOAD AND ROUTE OF MOVEMENTS: PONTIAC, MI TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, MO	7.72	GTW(294.2) - CHGO - NW(306)
Cincinnati, OH	6.55	GTW(26.1) - DET[1]- DTSL(59.0) TOLED - CR(212)
Chicago, IL	7.50	GTW(274.7) - BLUIS - IHB(19)
Buffalo, NY	5.70	GTW(55.7) - PTHUR - CN(189)
Pittsburgh, PA	6.77	GTW(26.1) - DET - NW(310)
Baltimore, MD	7.45	GTW(26.1) - DET[1]- DTSL(59.0) - TOLED - BO(609.0)
Philadelphia, PA	6.94	GTW(26.1) - DET[1]- DTSL(59.0) - TOLED - BO(705.7)
Louisville, KY	6.53	GTW(26.1) - DET[1]- DTSL(59.0) - TOLED - BO(329.0)
Cleveland, OH	6.50	GTW(26.1) - DET[1]- DTSL(59.0) - TOLED - BO(183.7)
Boston, MA	6.34	GTW(55.7) - PTHUR - CN(189) - BUFF - CR(493)
Newark, NJ	8.04	GTW(55.7) - PTHUR - CN(189) - BUFF - CR(444)
Richmond, VA	6.47	GTW(26.1) - DET[1]- DTSL(59.0) - TOLED -CO(687)

[1]Run - through trains GTW - DTSL

Table 16

AVERAGE LOAD AND ROUTE OF MOVEMENT: TOLEDO, OH TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, Mo	6.93	NW(458)
Cincinnati, OH	5.96	CR(212)
Chicago, IL	6.18	CR(216) - GIBSN-IHB(31)
Buffalo, NY	[1]	XXX
Pittsburgh, PA	4.32	NW(242)
Baltimore, MD	6.10	BO(609)
Philadelphia PA	7.76	CR(599)
Louisville, KY	6.59	CR(341)
Cleveland, OH	5.55	BO(183.7)
Boston, MA	5.48	CR(782)
Newark, NJ	[1]	XXXX
Richmond, VA	[1]	XXXX

[1] No traffic in 1976

Table 17

AVERAGE LOAD AND ROUTE OF MOVEMENT: GRAND BLANC, MI TO SELECTED PARTS DISTRIBUTION CENTERS

Distribution Center	Tons Per Car	Route and Miles
St. Louis, MO	6.59	CO(353) - CHGO - NW(306)
Cincinnati, OH	6.12	CO(99) - TOLED - CR(212)
Chicago, IL	6.44	CO(353) - CHGO - IHB(29)
Buffalo, NY	1	XXXX
Pittsburgh, PA	1	XXXX
Baltimore, MD	6.72	CO(708)
Philadelphia, PA	6.86	CO(650.9) - LURGA - CR(160.8)
Louisville, KY	5.65	CO(428)
Cleveland, OH	5.08	CO(282.7)
Boston, MA	3.50	CO(99) - TOLED - CR(782)
Newark, NJ	5.90	CO(99) - TOLED - CR(671)
Richmond, VA	2.41	CO(786)

[1] No traffic in 1976

Table 18

COMPARISON OF PER CARLOAD VARIABLE COST AND REVENUE ON OFFICIAL TERRITORY MOVEMENTS

Parts Plants	Item	St. Louis MO	Cincinnati OH	Chicago IL	Buffalo NY	Pittsburgh PA	Baltimore MD	Philadephia PA	Louisville KY	Cleveland OH	Boston MA	Newark NJ	Richmond VA
Martinsburg, WV	Cost	$571	$403	$593	$415	$348	$220	$346	$ 1/	$359	$421	$391	$398
	Revenue	754	586	702	522	404	284	340	XXX	498	592	556	398
	Ratio	1.3380	1.4541	1.1838	1.2578	1.1609	1.2909	.9827	XXX	1.3788	1.4062	1.4220	1.000
Flint, MI 2/	Cost	$524	$407	$370	$358	$430	$606	$646	$468	$389	$660	$649	$642
	Revenue	634	461	439	426	488	696	674	571	398	738	810	746
	Ratio	1.2099	1.1327	1.1243	1.1899	1.1349	1.1485	1.0433	1.2201	1.0231	1.1182	1.2481	1.1620
Drayton Plains, MI	Cost	$523	$376	$373	$354	$ 1/	$574	$620	$434	$364	$659	$642	$607
	Revenue	592	438	438	426	XXX	674	674	514	376	738	696	738
	Ratio	1.1319	1.1649	1.1743	1.2034	XXX	1.1742	1.0871	1.1843	1.0330	1.1199	1.0041	1.2158
Pontiac, MI	Cost	$529	$373	$370	$413	$308	$571	$617	$431	$360	$656	$636	$636
	Revenue	592	438	438	426	468	674	674	514	376	738	696	738
	Ratio	1.1191	1.1743	1.1649	1.0315	1.1759	1.1804	1.0924	1.1926	1.0444	1.1216	1.0943	1.1604
Toledo, OH	Cost	$396	$374	$315	$ 1/	$307	$468	$467	$338	$332	$551	$ 1/	$ 1/
	Revenue	552	388	424	XXX	424	612	634	450	324	746	XXX	XXX
	Ratio	1.3939	1.0374	1.1244	XXX	1.4774	1.3077	1.3576	1.3314	.9130	1.3539	XXX	XXX
Grand Blanc, MI	Cost	$557	$385	$421	$ 1/	$ 1/	$520	$632	$379	$309	$654	$608	$622
	Revenue	592	450	426	XXX	XXX	696	674	522	396	738	696	746
	Ratio	1.0628	1.1688	1.0119	XXX	XXX	1.3385	1.0665	1.3773	1.0922	1.1284	1.1447	1.1994

1/ No traffic in 1976.
2/ Plants 01 and 02.
NOTE: Revenue per July 1976 rates.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

Table 19

COMPARISON OF REVENUES RECEIVED: YEAR 1975

	Average Revenue		
	Per Car	Per Cwt.	Per Ton-mile
Total Carload Traffic			
United States to United States	$ 651	53.2¢	2.49¢
Official to Official	492	39.2	3.10
Official to South	807	77.7	2.61
Official to Western Trunk Line	1,059	168.2	4.32
Official to Southwestern	1,444	213.4	3.39
Official to Mountain-Pacific	2,514	442.1	3.61
Motor Vehicle Body Parts (37147)			
United States to United States	$ 795	190.9¢	7.61¢
Official to Official	632	146.4	9.46
Official to South	973	236.0	6.77
Official to Western Trunk Line	928	245.3	7.29
Official to Southwestern	1,312	343.7	5.93
Official to Mountain-Pacific	2,084	605.7	4.99
Motor Vehicle Accessories or Parts NEC (37149)			
United States to United States	$ 947	196.6¢	6.33¢
Official to Official	744	150.4	8.42
Official to South	1,035	227.5	6.00
Official to Western Trunk Line	1,067	214.0	6.13
Official to Southwestern	1,272	313.0	4.91
Official to Mountain-Pacific	2,413	543.0	4.34

Source: U. S. Department of Transportation, 1975 Carload Waybill Statistics, Statement TD-1, Washington, D. C. July, 1976.

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Table 20

COMPARISON OF REVENUE CONTRIBUTION TO COST: YEAR 1972

	Revenue to Variable Cost	Revenue to Fully Allocated Cost
Total Carload Traffic		
United States to United States	131.8%	101.9%
Offical to Official	123.6	95.6
Official to South	138.2	110.6
Official to West	147.4	124.3
Motor Vehicle Body Parts (37147)		
United States to United States	141.3	126.8
Official to Official	137.8	125.1
Official to South	154.9	138.7
Official to West	144.5	127.2
Motor Vehicle Accessories or Parts NEC(37149)		
United States to United States	151.3	132.7
Official to Official	152.0	134.8
Official to South	167.8	146.8
Official to West	146.8	127.2

Source: Interstate Commerce Commission, Rail Revenue Contribution by commodity and territory for the year 1972. Statement No. 153-72, Washington, D. C. April, 1975.

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QUALIFICATIONS

My name is William E. Anderson. I am President of Applied Economics, Incorporated, an economic consulting firm with offices located in Washington, D. C.

I am a graduate of Washington University of St. Louis with a B. S. degree in Business Administration with a major in economics. I have had two years of graduate work at the University of Illinois and during this time, I also worked half-time as a research assistant on field studies concerning manpower and labor employment problems.

Between 1958 and 1960, I worked as a research analyst for the Social Security Administration in Baltimore, MD., assisting in the planning, field survey administration, data summary and final analysis of national surveys directed to developing information on the socio-economic status of program beneficiaries as the basis for evaluation and recommendations of proposed legislative changes.

In 1960, I joined the transportation consulting firm of W. B. Saunders & Co. located in Washington, D.C. and since that time I have been serving in a consulting capacity in transportation and economics. During my six years with W. B. Saunders & Co., I worked with railroad and truckline clients in rate litigation, merger proposals and divisions cases covering these modes of transportation, as well as barge line operations. For two years, I assisted in studies of

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coal traffic and operations on both the Chesapeake & Ohio (C & O) and the Norfolk & Western (N & W) railroads and directed traffic and pricing studies utilizing extensive EDP programs on interline coal divisions for these two carriers.

In 1966, I became an independent consultant and for several years was employed primarily by the C & O and N & W in the development and analysis of traffic data in all of the several cases related to the proposed merger and control of these railroads and their family lines. Research directed to specific questions of government and regulatory policy has been carried out for the Department of the Interior, Department of Commerce and Department of Transportation (DOT). For non-carrier clients, other than governmental agencies, my studies and analyses have included economic impact, market surveys and economic feasibility.

In 1970, the firm was incorporated as Applied Economics Incorporated (AEI) in the District of Columbia and I have served as President since that time. The company continues to serve surface transportation clients as well as government agencies. At present, AEI is under contract to the DOT to perform analysis of productivity measures for selected sugments of the intercity bus industry and to the United States Railway Association (USRA) to conduct studies on the performance of the Missouri-Kansas-Texas Railroad and

the Delaware & Hudson Railway as well as various aspects of the monitoring of Conrail.

Transportation and economics studies covering ratemaking, operations and costs have been submitted to the firm's entire range of clients, including federal agencies. I have testified before the Interstate Commerce Commission and the Canadian Transport Commission. This includes Docket 35585, Official-Southern Divisions, where AEI represented the Northern railroads on behalf of the Traffic Executive Association - Eastern Railroads, including work on The Long Island Rail Road. I also testified in Docket 35153, Long Island Rail Road divisions case, on behalf of the major Official Territory defendant carriers.

I am a member of the Transportation Research Forum and the American Economic Association.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

IN THE MATTER OF

SWITCH CONNECTION CHARGE

AT BETHPAGE, NEW YORK

--LONG ISLAND RAIL ROAD

VERIFIED STATEMENT OF

WILLIAM BURKE

My name is William Burke. My business address is 385 Nordhoff Place, Englewood, N.J. 07631. I have been employed by General Motors Corporation since 1957. My present position with General Motors Corporation is Northeast Area Traffic Manager, General Motors Parts Division. I have been in my present position with General Motors Parts Division for nearly eight years.

Among my duties as Northeast Area Traffic Manager I am responsible for the day-to-day transportation functions of the General Motors Parts Division at Bethpage, Long Island, New York.

General Motors Parts Division is responsible for distributing automotive replacement parts to franchised General Motors automobile dealers. Automotive replacement parts are the items necessary to repair vehicles of General Motors customers and the total line of automotive replacement parts maintained by the Parts Division approximates 275,000 different items.

General Motors Parts Division maintains warehousing operations that are referred to as Parts Distribution Centers from which the automobile dealers are supplied replacement parts and accessories and these Parts Distribution Centers are located throughout the United States, including a Parts Distribution Center at Bethpage, Long Island, New York.

The Bethpage Distribution Center was built by General Motors Corporation in 1965, adjacent to the main line of the Long Island Rail Road, and is served by the Long Island Rail Road through a private industrial sidetrack which connects with the main line of the Long Island Rail Road through a switch connection.

Records to which I have access in my capacity as Northeast Area Traffic Manager indicate that the switch

connection was installed at the request of General Motors Corporation in 1965.

The private industrial sidetrack serving the Parts Distribution Center is owned and maintained by General Motors Corporation, and another party not here relevant, and is located on private property. The switch connection which connects the tracks of the railroad with the industrial sidetracks is owned by the railroad and located entirely on railroad property. At this location, as well as at every other General Motors facility with which I am familiar, General Motors maintains the track on its property and we expect the railroad to be responsible for maintaining the facilities owned by them and located on their right-of-way.

The Bethpage Distribution Center was located adjacent to the Long Island Rail Road because rail service is necessary to the operation of that facility. Automotive replacement parts and accessories are received in rail carload quantities from various points of origin outside New York State approximating two rail carloads daily.

The rail carloads are switched into the Parts Distribution Center over the private industrial sidetrack by engines and crews of the Long Island Rail Road to the regular unloading docks adjacent to the Parts Distribution Center in accordance with line haul freight rates published in tariffs filed with the Interstate Commerce Commission, tariffs to which the Long Island Rail Road is a party and a concurring line of railroad.

The line haul rail rates on which the automotive replacement parts traffic moves to the Bethpage Parts Distribution Center entitles each rail carload to be delivered by the Long Island Rail Road to the usual place of unloading which is the unloading dock in the Parts Distribution Center.

When the Bethpage Parts Distribution Center was built, it was designed to receive most of the inbound freight by railroad at the unloading docks. The operation at the Distribution Center is so conducted that the largest volume of freight must be received by rail in order to maintain the inventory of parts required to adequately meet customer demands. The Bethpage Center is not equipped to receive corresponding volumes of freight by other means of transportation.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

The Bethpage Parts Distribution Center serves automobile dealers on Long Island, the three western counties of Connecticut and the eastern counties of New York from New York City to the Canadian border. Average weekly volume is about ten (10) freight carloads of automotive and truck parts and components. These cars originate principally at Martinsburg, W. Va. and points in the Midwest, including Flint, Pontiac, Drayton Plains, Lansing and Grand Blanc, Michigan, and Ohio and Indiana points. The facility was originally designed to receive the great bulk of its incoming freight by rail.

I have read the verified statements of Messrs. Peabody, Powers, Faraci and Gaut submitted on behalf of the Long Island Rail Road in its Opening Statement of Facts and Argument and have the following comments.

Directing attention first to Mr. Peabody's statement concerning Traffic, Revenue and Operating Analyses commencing on page 4, he sets out in Table I the seven basic routes involved in the movement of the sample traffic to GM at Bethpage, New York. In that table he lists routes from origins such as Olney Station, Pa., Olney, Pa., and South Bend, Indiana. Located at

those points are outside suppliers from which we would receive freight on only a very limited scale. Last year only twenty-three carloads, or less than six percent of the inbound cars at Bethpage came from these three origins.

The bulk of the movement to Bethpage came from Martinsburg, W. Va., Pontiac and Drayton Plains, Michigan. Our Drayton Plains facility is the origin shown as Waterford in Mr. Peabody's table. Pontiac and Drayton Plains are contiguous municipalities, both of which are located on the main line of the Grand Trunk Western Railroad Company. Both GMPD parts plants located in Pontiac and Drayton Plains are located immediately adjacent to that main line.

Also, I should point out that our parts plant at Martinsburg is on the main line of the Baltimore and Ohio Railroad Company (Chessie System) with a reciprocal switch to Conrail. Martinsburg is also on the main line of Conrail. Thus, the traffic from these three origins would move in through train service.

On page 10 of his statement Mr. Peabody states that "The average car incurred per diem and mileage costs of $30.59." I do not know how Mr. Peabody arrived at that

expense but I do know that the operating practices of the Long Island resulted in additional per diem costs. On 70 different occasions last year, the Long Island Rail Road failed to switch empty cars that had been ordered out empty for removal from our Bethpage facility. According to our records, this failure resulted in 161 additional per diem days which would not have accrued had the Long Island Rail Road provided the switching service that other railroads would normally provide in a similar situation. Perhaps this failure to switch was done for the operating convenience of the railroad when it did not have inbound loads to deliver. The point I wish to make is that the additional per diem expense that may have thereby been incurred was in no way attributable to the traffic involved or to us as a shipper and receiver.

In addition to the foregoing switch failures, there were 16 other weekdays in 1976 when the Long Island Rail Road failed to place inbound loads at Bethpage contrary to normal placement instructions. Thus, since our facility at Bethpage is only switched once a day, there were a total of 86 weekdays in 1976 when we received no rail service. Here I should point out that there are under my jurisdiction seven other Parts Distribution

facilities in the Northeast similar in nature to Bethpage. Those are: Baltimore served by the Chessie System; Bloomfield and Englewood, N.J. served by Conrail; Boston - Conrail; Buffalo - Conrail; Philadelphia - Conrail, and Richmond, Virginia - Chessie System. We did not experience any such switch failures at these other locations last year.

Further in this regard, our records show that the transit time on traffic from Martinsburg, West Virginia to Bethpage averages seven days per car from the date of shipment to notice of arrival. Of the total transit time, 2.25 days thereof are incurred while each car is in the possession of the Long Island Rail Road. Thus, 32 percent of the car days in transit are incurred on the Long Island Rail Road even though its part of the line haul is a very small portion of the total route of movement miles on any shipment.

In the last paragraph of Mr. Faraci's statement, he concludes that the GM traffic moving to Bethpage is among the most unprofitable handled by the Long Island Rail Road. I do not know how he reached that conclusion. He presents no comparative statistics by which to measure the relative profitability of automotive parts traffic

versus other commodities handled by the Long Island. Absent any evidence to the contrary, I find such a statement difficult to believe because the origin railroads actively solicit automobile parts traffic and provide such special equipped boxcars as are necessary to handle that traffic.

It would seem to me that the Long Island's questionable operating practices which I have described above may reduce the profitability to them of our traffic.

In any event, Mr. Faracci's statement about the unprofitability of our traffic seems inconsistent with the position of the Long Island Rail Road in recent general freight rate increase proceedings. In Ex Parte Nos. 299-A, 303-B, 305-A, 310-A and 313 the Long Island indicated it would not participate in any increase of rates sought by the nation's railroads in those proceedings. Thereafter, on March 6, 1976, the Long Island changed its position and revealed that it would become a party to the increases granted in Ex Parte Nos. 303, 310 and 313. However, it has continued to flag out on a 2.8 percent general increase granted in Ex Parte No. 299, and a 10 percent increase permitted in Ex Parte No. 305.

Thus, although the freight rates on automobile parts traffic from, within, and to the East and the Midwest were increased by those percentages, the Long Island elected not to take that increase on traffic moving to or from stations on its line of railroad. However, shortly thereafter, the Long Island Rail Road imposed a 12.5 percent terminal surcharge on traffic originated or terminated on its line. Since the Long Island Rail Road is the only railroad serving Long Island, it would appear to me that it has market dominance of the area of New York State and since we need rail service to Bethpage, we were powerless to oppose the surcharge.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

VERIFICATION

STATE OF NEW JERSEY)
) ss
County of Bergen)

William Burke, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

WILLIAM BURKE

Subscribed and sworn to before me this _____ day of _____, A.D. 1977.

Margaret Donahue
County of Bergen NJ
My commission expires 4-15-

727a

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

IN THE MATTER OF

SWITCH CONNECTION CHARGE

AT BETHPAGE, NEW YORK

LONG ISLAND RAIL ROAD

VERIFIED STATEMENT

OF

HAROLD A. STATER

DIRECTOR OF TRAFFIC

GENERAL MOTORS PARTS DIVISION

GENERAL MOTORS CORPORATION

My name is Harold A. Stater. My business address is 6060 West Bristol Road, Flint, Michigan 48554. I am Director of Traffic, General Motors Parts Division, General Motors Corporation.

I have been employed by General Motors Corporation for 31 years. All of that time has been engaged in the field of

traffic and transportation. From 1946 to 1969 I worked in the traffic department of the Chevrolet Motor Division of General Motors Corporation, first in a clerical capacity in the Assembly Plant at Baltimore, Maryland, later as Assistant Traffic Manager and then Traffic Manager of the Assembly Plant at Tarrytown, New York. As Traffic Manager of the Assembly Plant at Tarrytown, New York from 1960 to 1967, I was not only responsible for the transportation needs of the Assembly Plant, but I was also responsible for the transportation of replacement parts into and out of the Parts Distribution facilities in the New England and Northern Middle Atlantic States. In 1967, I was transferred to the Chevrolet Central Office in Detroit as Assistant General Traffic Director of that Division, where I was in charge of the inbound movement of raw materials and production parts to the numerous Chevrolet manufacturing and assembly plants.

In July, 1969, I was appointed Director of Traffic of General Motors Parts Division. As Director of Traffic I am responsible for meeting the transportation requirements of the Division. This entails selecting the transportation modes that are necessary to move automotive replacement parts from supplier to parts plants, to distribution centers and to GM dealers. I am also responsible for supervision over the payment of freight bills and for the filing and collection of loss and damage claims.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

GENERAL MOTORS PARTS DIVISION

General Motors Parts Division was established as a separate division of General Motors on March 1, 1969. Prior to that time the distribution of parts had been the responsibility of the various car divisions. The Parts Division stores and distributes automobile replacement or service parts and accessories for Chevrolet, Pontiac, Oldsmobile, Buick and Cadillac passenger cars and Chevrolet trucks. When the Parts Division was formed it utilized nearly 19 million square feet of warehouse space in fifty warehouses located throughout the United States. These warehouses are called Parts Distribution Centers and this complex of facilities inventoried approximately 330,000 different parts for current and past model vehicles. Since then the number of facilities and parts has been reduced.

General Motors Parts Division was established as a separate division to improve the availability of all parts to General Motors franchised dealers to better serve the needs of the motoring public, both as to warranty and normal service. There are approximately 12,000 franchised General Motors dealerships in the United States. Improved transportation improves availability of all parts to GM dealers and the independent repair shops, who use General Motors dealers as their source for parts, to better serve their customers. Although the dealers are the receivers of our parts, the Parts Division has the responsibility of arranging for the entire transportation of this traffic from our facilities or other sources of supply to each dealership.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

The Bethpage, New York Parts Distribution Center and the movement of automotive replacement parts traffic into and out of that facility has been described in the verified statement of Mr. William Burke. Mr. Burke's transportation responsibilities are under my direction.

As Mr. Burke points out in his verified statement, rail service is necessary to the operation of the Bethpage facility since the majority of inbound traffic is received by rail. That is generally true at our other Parts Distribution Centers throughout the country. At each of the principal supply sources such as Martinsburg, West Virginia, Drayton Plains, Flint and Pontiac, Michigan, the railroads assign special equipped rail cars to handle this traffic. When an assigned rail car is made empty at destination the terminating railroad is required under the car service rules to return the car empty by the reverse route of movement to the station at which the car is in assigned service. While there is always an empty return movement on assigned cars, we have determined from past experience with the railroads in providing suitable cars for loading at origin that assigned cars get better utilization than unassigned cars for the turn around time is correspondingly less than free runners because there is usually a load known to be available at origin.

To improve car utilization and to reduce detention time at origin and demurrage at destination, we have implemented

a program to achieve just that, by expediting and tracing both the loaded and empty movements. When a car is made empty at Bethpage, or any other General Motors Parts Division Parts Distribution receiving facility, that location communicates that fact to our central office in Flint by GM Communication Telex. This shows the empty car initial and number, the date released empty to the terminating railroad and the origin point to which it is to be returned. Our Telex System interfaces with the electronic reporting system of most major railroads so that we are able to follow the progress of each car as it moves to and from each railroad in the route. Thus, we have advance notice of when the empty should return and be made available at the point of origin. In this way we can keep closer surveilance over the rail car supply needed to handle our loads for the dual purpose of having an adequate car supply and at the same time keeping empty car detention and storage charges at a minimum.

At Martinsburg, West Virginia, for example the Chessie System serves our Parts Plant at that location and is the assigned car pool operator. The Martinsburg Plant will load about 28 rail cars a day. By the middle of each week our traffic representative at that location will forecast the approximate number of empties that will be required during the next week to meet prospective shipping schedules. It is often necessary for the Chessie to supplement the assigned car

fleet with unassigned cars to meet our loading requirements. During the past four to six weeks we have found that about an additional 25 unassigned cars were required each week to handle the movement from Martinsburg. Thus, from 18 to 20 percent of the traffic from Martinsburg move in unassigned rail cars.

During this period we have not detained the rail cars for loading and we have not incurred empty car storage charges at Martinsburg, indicating good car utilization on this assigned equipment.

Of course our employes load these rail cars at origin, close and seal the car doors before they are released to the railroad. Once the empty rail car is placed at the normal loading spot for loading the car is loaded during one to two work shifts, but in less than 24 hours. On the average, the car is loaded, sealed and released to the origin carrier within 8 hours from the time the empty is placed for loading. At destination our employes open the car doors, remove the lading, replace the empty shipping devices within the car, close and seal the doors. General Motors owns all of these shipping devices. Thus, the railroads perform no special services on the cars used to transport our traffic, they do not have to clean these cars, provide or repair any shipping devices or provide any coopering service.

Also, because of our packaging practice and the utilization of shipping devices in which most of this traffic is transported, our rail loss and damage experience is virtually non existent. In fact, our Bethpage facility filed no loss and damage claims against the railroads in 1976.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

VERIFICATION

STATE OF MICHIGAN)
) ss.
County of Genesee)

Harold A. Stater, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Harold A. Stater

Subscribed and sworn to
before me this 30th
day of March, A.D., 1977.

Janet M. Stanton

JANET M. STANTON
Notary Public, Genesee County, Mich
My Comm. Expires October 6, 1980

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

SWITCH CONNECTION CHARGE

AT BETHPAGE, NEW YORK

--LONG ISLAND RAIL ROAD

VERIFIED STATEMENT OF

JOHN TOBIN

My name is John Tobin. My business address is General Motors Corporation, 3044 West Grand Boulevard, Detroit, Michigan 48202. I have been employed by the Real Estate and Property Management Section of the Manufacturing Staff of General Motors Corporation since 1965. My present position with this Section is as Head of the Industrial and Commercial Department.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

The Real Estate and Property Management Section of the Manufacturing Staff of General Motors Corporation is responsible for acquisition, management, and development functions of real estate owned by or leased to General Motors Corporation. The General Motors Parts Division facility at Bethpage, Long Island, New York, is owned by General Motors Corporation.

Among my duties as Head of the Industrial and Commercial Department is the administration of all General Motors facilities served by the several railroads, including the General Motors Parts Division facility at Bethpage, Long Island, New York. Included in the responsibilities of my position is the examination and approval of sidetrack agreements between General Motors and the several railroads for the General Motors facilities served by rail. The Real Estate and Property Management Section of the Manufacturing Staff has worked with General Motors Parts Division in negotiating a sidetrack agreement proposed by The Long Island Rail Road at Bethpage, Long Island.

General Motors Corporation has over 150 plants and facilities located throughout the central states and

Canada with switch connections at each location with the railroad or railroads serving the area. Many locations are served by more than one rail carrier. A list of the facilities and the carrier(s) serving them is attached as part of my statement. At most, if not all locations, sidetrack agreements are in effect with the railroads serving the General Motors facility. I should add, however, that in all instances, sidetrack agreements are proposed by the railroads. General Motors does not consider that such agreements are necessary for the rail service involved.

I am aware of no instance, other than the one presently before this Commission, in which a rail carrier has demanded payment from General Motors for maintenance of railroad-owned track connecting industry sidetrack to a main line, for track lying upon property owned by the rail carrier, or threatened discontinuance of service.

At all General Motors facilities served by rail, General Motors is ultimately responsible for maintenance of track lying upon its own property, and the railroads are responsible for that track lying upon lands owned by or leased to them.

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

General Motors is a substantial user of rail services and does not believe the demands made upon it by The Long Island Rail Road to be reasonable.

VERIFICATION

STATE OF MICHIGAN)
) ss.
County of Wayne)

John Tobin, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

John Tobin

Subscribed and sworn to before me this 1st day of April, A. D., 1977.

Patricia P. Arquette

PATRICIA P. ARQUETTE
Notary Public, Wayne County, Mich.
My Commission Expires Sept. 14, 1977

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

LIST OF GM FACILITIES SERVED BY RAIL

PLANT NAME	LOCATION	SERVED BY RAILROAD(S)
AC Spark Plug	Flint, Mich.	C&O
Buick Motor	Flint, Mich.	C&O
Cadillac Motor Car	Detroit, Mich.	PC, DT
	Livonia, Mich.	C&O
Central Foundry	Saginaw, Mich.	C&O
	Bedford, Ind.	L&N, Milw
	Danville, Ind.	PC
	Defiance, Ohio	B&O
Chevrolet Motor	Bay City, Mich.	PC, B&O
	Buffalo, NY	EL
	Detroit, Mich.	GTW, PC
(Assembly)	Flint, Mich.	GTW
(Eng. & Met. Fab.)	Flint, Mich.	GTW
(Manufacturing)	Flint, Mich.	GTW
	Indianapolis, Ind.	I.U.
	Livonia, Mich.	C&O
	Massena, NY	PC
	Muncie, Ind.	PC
	Parma, Ohio	PC, B&O
	Saginaw, Mich.	C&O
	Toledo, Ohio	DT&I
	Tonawanda, NY	PC
	Warren, Mich.	PC
Delco Electronics	Kokomo, Ind.	PC
Delco Moraine	Dayton, Ohio	PC, B&O
Delco Products	Kettering, Ohio	PC
	Rochester, NY	B&O
Delco Remy	Anderson, Ind.	PC, CIND
	Anaheim, Calif.	SP
	Fitzgerald, Ga.	SCL
	Laurel, Miss.	ICG
	Meridian, Miss.	ICG
	Muncie, Ind.	PC,CO
	New Brunswick, NJ	PC
	Olathe, Kans.	ATSF
	Shreveport, La.	ICG
Detroit Diesel-Allison	Indianapolis, Ind.	PC, B&O
	Detroit, Mich.	C&O
	Wayne, Mich.	C&O
Diesel Equipment	Grand Rapids, Mich.	C&O
Electro Motive	LaGrange, Ill.	BOCT, IHB
Fisher Body	Chicago, Ill.	ATSF
(Coit Road)	Cleveland, Ohio	PC
	Columbus, Ohio	PC
	Elyria, Ohio	PC
(Euclid)	Cleveland, Ohio	N&W

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

PLANT NAME	LOCATION	SERVED BY RAILROAD(S)
Fisher Body con't		
(Fleetwood)	Detroit, Mich.	CO, PC, NW
(Fort Street)	Detroit, Mich.	CO, PC, NW
(Coldwater)	Flint, Mich.	C&O
(Flint #1)	Flint, Mich.	C&O
	Grand Blanc, Mich.	C&O
(Metal Fab.)	Grand Rapids, Mich.	PC
(Trim)	Grand Rapids, Mich.	PC
	Hamilton, Ohio	B&O
	Kalamazoo, Mich.	PC, GTW
	Lansing, Mich.	PC
	Livonia, Mich.	C&O
	Lordstown, Ohio	PC
	Mansfield, Ohio	EL
	Marion, Ind.	PC
	Pittsburgh, Penn.	URR
	Pontiac, Mich.	GTW
	Syracuse, NY	PC
	Tecumseh, Mich.	DTI
	Trenton, NJ	RDG
Frigidaire	Dayton, Ohio	B&O
	Moraine, Ohio	PC
GM Assembly	Westland, Mich.	C&O
	Arlington, Texas	T&P
	Baltimore, Md.	B&O, PC
	Detroit, Mich.	PC
	Doraville, Ga.	Sou
	Fairfax, Kans.	UP
	Framingham, Mass.	PC
	Freemont, Calif.	SP
	Janesville, Wisc.	CNW. Milw
	Lakewood, Ga.	Sou
	Leeds, Md.	MP
	Linden, NJ	PC
	Lordstown, Ohio	PC
	Norwood, Ohio	PC, B&O
	St. Louis, Mo.	TRRA
	South Gate, Calif.	SP
	Tarrytown, NY	PC
	Van Nuys, Calif.	SP
	Willow Run, Mich.	PC
	Wilmington, Del.	B&O

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

PLANT NAME	LOCATION	SERVED BY RAILROAD(S)
GM Parts	Atlanta, Ga.	Sou
	Baltimore, Md.	B&O
	Birmingham, Ala.	Sal
	Bloomfield, NJ	EL
	Boston, Mass.	PC
	Buffalo, NY	PC
	Charlotte, N.C.	SCL
	Chicago, Ill.	IHB
	Cincinnati, Ohio	PC
	Cleveland, Ohio	B&O, PC
	Dallas, Tex.	MKT
	Denver, Colo.	UP
(Riopelle Avenue)	Detroit, Mich.	GTW
(Decatur Avenue)	Detroit, Mich.	C&O
	Drayton Plains, Mich.	GTW
	Flint, Mich.	GTW
	Grand Blanc, Mich.	C&O
	Houston, Tex.	SP
	Indianapolis, Ind.	PC
	Jacksonville, Fla.	FEC
	Kansas City, Kans.	SLSF
	Lansing, Mich.	GTW
	Livonia, Mich.	C&O
	Los Angeles, Calif.	ATSF
	Louisville, Ky.	Sou
	Martinsburg, W. Va.	B&O
	Milwaukee, Wisc.	Milw
	Minneapolis, Minn.	MNES
	New Orleans, La.	ICG
	New York, NY	LI
	Newark, NJ	EL
	Oakland, Calif.	SP
	Oklahoma City, Okla.	ATSF
	Omaha, Neb.	UP
	Philadelphia, Penn.	RDG
	Pittsburgh, Penn.	N&W
	Portland, Ore.	BN
	Pontiac, Mich.	GTW
	Richmond, Va.	C&O

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

PLANT NAME	LOCATION	SERVED BY RAILROAD(S)
GM Parts con't	St. Louis, Mo.	N&W
	Toledo, Ohio	PC
GMC Truck & Coach	Pontiac, Mich.	GTW
	Boston, Mass.	BM
	Chamblee, Ga.	Sou
	Chicago, Ill.	BOCT
	Dallas, Tex.	MKT
	Elizabeth, NJ	CNJ
	Kansas City, Kans.	UP
	Memphis, Tenn.	ICG
	Oakland, Calif.	SP
	Pittsburgh, Penn.	BLE
	Willow Run, Mich.	PC
Guide Div.	Anderson, Ind.	PC
	Monroe, La.	ICG
Harrison Radiator Div.	Lockport, NY	PC
	Buffalo, NY	EL
Hydra-Matic Div.	Willow Run, Mich.	PC
Inland Div.	Dayton, Ohio	B&O
	Vandalia, Ohio	B&O
New Departure - Hyatt Bearings	Bristol, Conn.	PC
	Clark, NJ	LV
	Sandusky, Ohio	N&W
Oldsmobile Div.	Lansing, Mich.	GTW, PC
Packard Electric Div.	Jackson, Miss.	ICG
	Warren, Ohio	EL
Pontiac Motor Div.	Pontiac, Mich.	GTW
Rochester Products Div.	Rochester, NY	Rochester Subway R.R.
Saginaw Steering Gear Div.	Limestone County, Ala	LN
	Saginaw, Mich	C&O
Terex Div.	Cleveland, Ohio	N&W
	Hudson, Ohio	PC
United Delco Div. (Warehouses)	Atlanta, Ga.	Sou
	Dallas, Tex	MKT
	Denver, Colo.	Up
	Detroit, Mich.	Union Belt
	Elk Grove Village, Ill.	CNW
	Kansas City, Kans.	UP
	LaMirada, Calif.	ATSF
	Memphis, Tenn.	MP
	North Brunswick, NJ	PC
	Seattle, Wash.	UP

PROTESTANT'S OPENING STATEMENT OF FACTS AND ARGUMENT

EXPLANATION OF RAILROAD ABBREVIATIONS

Abbreviation	
ATSF	The Atchison, Topeka, and Santa Fe Railway Company
B&O	Baltimore and Ohio Railroad Company
BM	Boston & Maine Corporation-Robert W. Meserve and Charles W. Bartlett, Trustees
BOCT	The Baltimore and Ohio Chicago Terminal Railroad Company
BLE	Bessemer and Lake Erie Railroad Company
BN	Burlington Northern, Inc.
CNJ	The Central Railroad Company of New Jersey, Robert D. Timpany, Trustee
Milw	Chicago, Milwaukee, St. Paul and Pacific Railroad Company
CIND	Central Indiana Railway Company
CNW	Chicago and North Western Transportation Company
C&O	The Chesapeake and Ohio Railway Company
DTI	Detroit Toledo and Ironton Railroad Company
DT	Detroit Terminal Railroad Company
EL	Erie Lackawanna Railway Company, Thomas F. Patton and Ralph S. Tyler, Jr., Trustees
FEC	Florida East Coast Railway Company
GTW	Grand Trunk Western Railroad Company
IHB	Indiana Harbor Belt Railroad Company
ICG	Illinois Central Gulf Railroad Company
IU	The Indianapolis Union Railway Company
LI	The Long Island Railroad Company
LN	Louisville Nashville Railroad Company
LV	Lehigh Valley Railroad Company, John F. Nash and Robert C. Haldeman, Trustees
MP	Missouri Pacific Railroad Company
NW	Norfolk and Western Railway Company
PC	Penn Central Transportation Company, George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees
RDG	Reading Company, Richardson Dilworth and Andrew L. Lewis, Jr., Trustees
SCL	Seaboard Coast Line Railroad Company
SLSF	St. Louis-San Francisco Railroad Company
SP	Southern Pacific Transportation Company
Sou	Southern Railway Company
TRRA	Terminal Railroad Association of St. Louis
TP	The Texas and Pacific Railway Company
URR	Union Railroad Company
UP	Union Pacific Railroad Company

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.,

LONG ISLAND RAIL ROAD

REPLY STATEMENT OF FACTS AND ARGUMENT ON BEHALF OF RESPONDENT, THE LONG ISLAND RAIL ROAD COMPANY

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
Washington, D. C. 20036
Attorneys for The Long Island
Rail Road Company

Due Date: April 25, 1977

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY
BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.,

LONG ISLAND RAIL ROAD

REPLY STATEMENT OF FACTS AND ARGUMENT
ON BEHALF OF RESPONDENT,
THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF FACTS

Prior to 1954, LIRR's practice was to require industries to bear the entire cost of maintaining private sidings and switch connections. That policy was changed in 1954 in order to meet competition and to attract additional industry to Long Island. Under the new policy, the industry paid the cost of constructing and maintaining only that portion of the sidetrack beyond the right-of-way line, and the LIRR was responsible for the construction and maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, LIRR returned to its previous policy which required industries to bear the entire cost of constructing and maintaining the

private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before General Motors Corporation ("GM") refused to execute the same type of contract signed by other shippers or receivers. (In its brief, GM tries to give the impression that it was the only one asked to bear the maintenance cost, but this is not so; it was merely the first to refuse to do so after 169 other shippers had agreed.)

Litigation then ensued before the U. S. District Court for the Eastern District of New York and before the Commission. Upon referral from the District Court, in its report and order on reconsideration in Docket 35790, General Motors Corp., Long I. R. Priv. Sidetrack, 351 I.C.C. 691, 699, the Commission's Division 3 ruled that, on the evidence of record, LIRR could not impose the proposed maintenance charge on GM as part of a private siding agreement. Division 3 emphasized, however (at pp. 698-699):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."

Subsequently, after the filing of briefs and hearing oral argument, the United States District Court for the Eastern District of New York, based upon the above quoted language of the Commission, issued a permanent injunction against the LIRR restraining it from ceasing service at GM's Bethpage siding because of GM's refusal to execute LIRR's standard sidetrack agreement. An appeal was taken by LIRR to the United States Court of Appeals for the Second Circuit, the prosecution of which appeal was then deferred indefinitely by the Court on the application of the LIRR pending the outcome of the instant investigation.*/

The involved tariff, LIRR Freight Tariff 72, I.C.C. 1119, was originally published by LIRR to become effective January 15, 1977, but after a late protest was filed by GM on January 12, 1977, LIRR received Special Permission No. 77-2203 to postpone the effective date of the tariff, on one day's notice, to January 31, 1977.

By order dated January 26 and served January 28, 1977, the Commission's Suspension and Fourth Section Board declined to suspend the tariff, but ordered the institution of the instant investigation. A petition for reconsideration filed by GM was denied by Division 2 on January 28, 1977. By order dated January 28 and served January 31, 1977, Commissioner O'Neal ordered that

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*/ It should be noted that approval of the switch connection charge in this proceeding will render moot the appeal before the U. S. Court of Appeals for the Second Circuit.

this matter be handled under modified procedure. LIRR's opening statement of facts and argument and the accompanying verified statements of James L. Faraci, Leroy E. Peabody, Jr., Charles W. Powers, and Charles H. Gaut, which were due on February 22, 1977, were filed and served on February 16, 1977. Upon its application, GM was granted an additional 10 days from March 24 to April 4, 1977, purportedly to copy underlying work papers and LIRR's Rail Form A, but no requests for such material were made during the 10-day extension.

ARGUMENT

GM's opening statement of facts and argument and the accompanying verified statements are an unbelievable maze of contradictions, inconsistencies, and attempted obfuscations.

In its brief, GM first argues (pp. 5-6) that since Witness Peabody's study showed that the rates fail by a wide margin to cover the variable costs, the rates cannot be held reasonable, presumably because they are too low, but then it goes on to argue (pp. 6-11) that the rates may exceed a maximum reasonable level.

While GM is fighting the additional charge of $4.39 per car, which would amount to about $1,800 per year, Witness Burke complains (V.S., p. 9) that LIRR flagged out of several general increases which saved GM many thousands in transportation charges.

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While Witness Anderson contends that LIRR's switching costs are too high, Witness Burke complains (p. 7) because LIRR did not make an additional 70 switches at Bethpage last year to remove empty cars which would, of course, have increased the switching expenses that much more.

Undoubtedly the most glaring contradiction is Witness Anderson's criticism of the use by Witness Peabody of Official territory costs for the movement over four Class I carriers and his own use of such Official territory unit costs not only for the four Class I carriers, but also for the LIRR, after he, himself, had demonstrated that LIRR's unit costs were very different from Official territory unit costs.

GM's whole presentation seems to be based on the premise that if it can inject enough confusion into the case, it may be able to prevail. We are sure the Commission will see through this ploy.

As mentioned above, Division 3 has spelled out the requirements for approval of a separate switch connection maintenance charge when it stated there must be:

> "...a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial." (351 I.C.C. at 698-699)

LIRR has clearly and completely met those requirements.

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I. THE PROPOSED MAINTENANCE CHARGE IS CLEARLY JUST AND REASONABLE, NONPREJUDICIAL AND NONPREFERENTIAL.

In 1976, GM received 403 cars by rail at Bethpage which, at $4.39 per car, would have resulted in total maintenance charges of $1,789.17, which is just about the estimated annual cost ($1,806.00) shown in the Verified Statement of Charles H. Gaut, filed earlier herein with LIRR's opening statement of facts and argument.

GM makes no attempt to dispute the reasonableness of the separate switch maintenance charge, either by claiming that the estimated annual costs or the amount of the per-car charge are too high.

Instead, GM makes numerous contradictory and inconsistent arguments of the type mentioned above and submits a few verified statements by some of its employees which are of the self-serving "public relations" type and are largely irrelevant to any issues in this proceeding. To the extent they contain any material which could in any way be considered relevant, they are answered in the Reply Verified Statement of Leroy E. Peabody, Jr.

In addition to being unquestionably reasonable, the proposed maintenance charge would also clearly be nondiscriminatory, nonprejudicial and nonpreferential and, in fact, would result in removing the present undue preference which LIRR is forced to give to GM because of the decision od Division 3. After LIRR's old

policy was reestablished in 1970, GM was the 170th shipper or receiver to whom LIRR's standard sidetrack agreement was presented and the first to refuse to sign. Thus, the per-car charge at Bethpage is necessary to remove the present unlawful preference in favor of GM, and would prevent GM from getting the "free ride" which it seeks.

As Witness Faraci stated in his earlier verified statement, LIRR would prefer its normal method of entering into contractual arrangements with shippers and receivers for the maintenance of switch connections under Section 1(9), but is bowing to the Commission's ruling in publishing the per-car maintenance charge at GM's Bethpage plant. (Subsequent to its decision in the General Motors case, Division 3 made it clear in Docket No. 36163, Allied Container Corporation v. Maine Central Railroad Company, decided October 27, 1976, that a railroad has a right to reasonable compensation for the cost of maintaining a switch connection and that the practice of charging patrons separately may be a reasonable method of compensation under Section 1(9).) The LIRR tariff makes it clear that the per-car charge will be published only "where no contractual arrangement exists for the maintenance of switch connection to such private siding." In affirming the Commission's decision, Judge Mishler made it clear that his decision applied only to the Bethpage switch connection, and LIRR intends to con-

tinue to be reimbursed for maintenance of other switch connections by contractual arrangements, with separate tariff charges to be published only where a shipper or receiver, like GM. refuses to enter into such contractual arrangements.

II. DESPITE THE ADDITIONAL CHARGE FOR MAINTENANCE, THE EXISTING LEVEL OF RATES WILL BE REASONABLE AND, IN FACT, WILL CONTINUE TO BE UNDULY LOW.

The proposed maintenance charge also clearly meets the other part of the test quoted above which was laid down by Division 3 in Docket No. 35790, namely, that it must be shown the "existing level of line'haul rates is reasonable, despite the additional charge for maintenance." By "reasonable", Division 3 obviously meant the rates must not exceed a maximum reasonable level. As was stated by Mr. Faraci, the involved GM traffic moving to Bethpage is among the most unprofitable handled by LIRR and, based on available figures, LIRR would need an additional $315 per car, instead of the $4.39 it seeks, to break even on GM's Bethpage traffic.

In LIRR's opening statement and accompanying verified statements, it was shown that the existing level of line-haul rates to GM's plant at Bethpage is not unreasonably high -- and, in fact, is extremely low -- and will continue to be so, despite the additional charge for maintenance.

In an obvious attempt to confuse and obfuscate (pp. 5-6), GM perceives an inconsistency between Witness Peabody's revenue-

cost study which showed the rates failed to cover even the variable costs by a wide margin and LIRR's argument that the rates were reasonable, that is that they do not exceed a maximum reasonable level. In effect GM is asserting that LIRR is inconsistent in maintaining that rates which are noncompensatory do not exceed a maximum reasonable level, which is about as specious an argument as one could contrive.

LIRR has shown clearly that the rates to Bethpage are below a minimum reasonable level and could readily take a substantial increase, but the additional $4.39 charge per car is the most that it can impose under the criteria laid down by Division 3 in the General Motors case. As Witness Peabody shows in his accompanying Reply Verified Statement (p. 23), LIRR's variable costs on GM's traffic to Bethpage averaged $383 and its revenue averaged $222 per car, so that in order to meet even its variable costs, LIRR would need additional revenue of about $161.00 per car instead of the $4.39 it is now collecting. To meet the variable costs of all carriers, an additional $289.00 per car would be required. The additional $4.39 per car will admittedly reduce the huge loss on this traffic only by a slight degree, but it clearly should not be disapproved because it will eliminate only a very small part of the deficit and not the entire amount.

The next argument made by GM (pp. 6-11) is even more difficult to understand. In numerous cases, including some cited by GM, the Commission has held that rates which exceed variable or fully allocated costs, even by very substantial margins, do not necessarily exceed a maximum reasonable level. In a classic non sequitur, GM seems to argue that these cases also stand for the proposition that rates which are noncompensatory, like those here involved, may well exceed a maximum reasonable level. So far as we are aware, the Commission has never so held, and the cases cited by GM have no value as precedents in the instant proceeding.

GM then argues (pp. 11-15) that the Commission's "Burden Studies" have shown that auto parts traffic is generally profitable and that such "Burden Studies" should be used instead of the revenue-cost relationships on the traffic to Bethpage actually involved in the present proceeding. Obviously, in determining whether a separate switch connection charge at Bethpage is reasonable, the revenue-cost comparisons used must be those relating to the traffic moving to Bethpage. Whether auto parts traffic moving to other points in the United States or even Official territory is or is not profitable is clearly immaterial in deciding the reasonableness of the rates to Bethpage.

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GM criticizes LIRR's cost-revenue comparisons. (pp. 15-20) In his opening verified statement, LIRR's Witness Peabody showed that the revenues realized by all carriers on the movement of auto parts to Bethpage were only 59 percent of the total variable costs, and those of LIRR only 54 percent of variable costs. GM's Witness Anderson (Appendix B) criticized just about everything Mr. Peabody did.

Most of the modifications suggested by Mr. Anderson would have had little effect on the end result.

In his Reply Verified Statement, Mr. Peabody restated his revenue-cost comparisons. He adopted those few suggestions of Mr. Anderson which appeared to have some merit and a few others where the information necessary to demonstrate their invalidity was not readily available. As restated by Mr. Peabody, the ratio of revenues to variable costs for all carriers increases from 59 to 63 percent and for LIRR from 54 to 58 percent (R.V.S. p. 24). Thus, when those suggestions of Witness Anderson which appear, even superficially, to have some merit are accepted, the involved rates to Bethpage are still noncompensatory by a very wide margin.

Finally, GM argues (pp. 20-22) that LIRR's financial condition is more attributable to its rate-making practices than to existing levels of line-haul rates. GM complains because LIRR

flagged out of several general freight rate increases (from which GM obviously greatly benefited) and then subsequently joined in such increases. The Commission is thoroughly familiar with the reasons behind LIRR's actions, particularly the settlement with Consolidated Rail Corporation to preserve joint rates to LIRR points (including those to plant at Bethpage), and a lengthy restatement of those reasons would serve no useful purpose here.

In short, LIRR has clearly met all of the criteria laid down by Division 3 in the General Motors case, and GM has completely failed to present anything which would justify a contrary finding.

III. CONCLUSION

For the reasons set forth above and in LIRR's opening statement of facts and argument, the Commission should find the switch connection maintenance charge is just and reasonable, nondiscriminatory, nonprejudicial, and otherwise lawful in all respects, and the investigation should be discontinued.

Respectfully submitted,

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Due date: April 25, 1977

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Statement of Facts and Argument and accompanying Verified Statement have this day been served, by first class mail, postage prepaid, upon counsel for General Motors Corporation.

Dated at Washington, D. C., this 25th day of April, 1977.

WALTER J. MYSKOWSKI

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY
BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y.

THE LONG ISLAND RAIL ROAD

REPLY
VERIFIED STATEMENT
OF
LEROY E. PEABODY, JR.

On Behalf of
The Long Island Rail Road Company

Due Date: April 24, 1977

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

My name is Leroy E. Peabody, Jr. I previously submitted a Verified Statement in this proceeding under due date of February 22, 1977. Subsequent to that date, on March 5, 1977, I received copies of verified statements filed on behalf of General Motors Corporation (GM). My review and analysis of these statements have not changed the conclusions reached in my original statement.

My analyses of the evidence introduced by Protestant are discussed under the following topics:

- ¶ Work Papers
- ¶ Sampling
- ¶ Traffic and Operating Characteristics
- ¶ Official Territory Costs
- ¶ Protestant's Restatement
- ¶ Other Official Territory Movements of Auto Parts
- ¶ Summary

WORK
PAPERS

Work papers should not be a controversial subject for either party. However, Protestant has raised this issue in incorrectly stating that certain of The Long Island Rail Road Company (LIRR) evidence was not subject to check or that only summary data was made available.[1/]

1/ See Verified Statement of William E. Anderson, p. 3 and pp. 8-9.

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My original Verified Statement was submitted February 22, 1977. Shortly thereafter, two representatives of GM came to my office to review the underlying work papers. These papers included summaries and details concerning the study I introduced, including copies of the actual sample abstracts used to identify all data, e.g., revenue, origins, involved railroads, car initial and number. All work papers were supplied these representatives and an office was made available for their use with no restrictions on the time required. After examining these papers for a few hours, including requests for clarification (which were answered), a request was made for copies. Copies were made of every underlying work paper with the exception of LIRR's Rail Form A. GM representatives abstracted what I assume they required from LIRR's Rail Form A - there was no restriction.

These representatives also requested information concerning basic railroad records underlying certain of my work papers. Complete information was provided so that direct contact could be made with involved LIRR personnel. At the conclusion of this meeting, these representatives left my office with copies of all work papers underlying my Verified Statement, with the exception of LIRR's Rail Form A. No further contacts were made nor was any effort made to review further LIRR's Rail Form A or to inspect basic LIRR records at my office or at LIRR's offices in New York.

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Counsel for GM filed a pleading with the Interstate Commerce Commission (ICC) requesting a copy of LIRR's Rail Form A. The misleading nature of this request is shown by the following quote from the ICC order:

> "...protestant states that, although respondent has allowed protestant access to its Rail Form A study and certain of the underlying work papers, respondent has refused to allow protestant to copy that study and the work papers..." (emphasis supplied)

As stated hereinabove, my office made copies of all work papers with the exception of LIRR's Rail Form A. While the ICC Order served March 24 required that Respondent make available the Rail Form A "for the purposes of inspection and copying", no further request was made by Protestant and their evidence was filed on April 4, 1977.

SAMPLING

Protestant's witness is critical of LIRR's study in that:

> "...LIRR presentation and work papers provide no indication of the use of stratification, replication or the calculation of standard errors." (Anderson V. S., p. 3)

Stratification

Stratification provides a sampling method which can result in greater precision if distinguishing features of the sample observations are grouped. For example, if a traffic and cost study were to be made for a number of different commodities

with unique traffic and operating characteristics, one might stratify on the basis of commodity. However, in the instant case, we were dealing basically with one commodity, auto parts, which moved in equipped general service box cars with a limited number of origins, over a limited number of railroads to one consignee at one destination on Long Island, New York. Thus stratified sampling was not employed. To the extent that the variation in distinguishing features affects the study, the result is shown by the magnitude of the standard errors.

Replication

A replicate sample design is used to reduce the effort in computing the standard error. As stated in the ICC Guidelines[1/] (p. 5):

> "The main advantage of replication is ease in computing the estimated standard errors."

By use of the word "ease" the Commission refers to the mathematical computations required to compute the standard error. The use of a few subsamples independently drawn allows one to compute the standard error from the variance between each independent subsample and the total for all subsamples. With the use of a computer this technique is no longer required. My sample of 40 observations represents a replicate sample design. Each observation was independently drawn.

1/ ICC, Guidelines for the Presentation of Sample Studies.

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Standard
Error

In response to Protestant's criticism, I have computed the estimated standard error for the ratio of revenues to variable costs. Results are shown below:

Item	Ratio of Revenues to Costs
(1)	(2)
1. Sample Ratio	0.5866
2. Standard Error	0.0172
3. 95% Confidence Interval	0.0341

The 95 percent confidence interval results in a range in the ratio of revenues to variable costs of from 0.5525 to 0.6207.

As explained hereinabove, copies of my underlying work papers were provided Protestant's witness. Thus he had all the necessary data to compute the standard error and, while he was critical of my failure to compute such errors, no attempt was made to show the results. The size of the standard error as demonstrated above, explains Protestant witness's failure to provide the ICC with such data. It verifies that the sample was statistically valid.

Universe vs.
Sample

Protestant's witness then goes on to state that he was unable to make any further check because of access to work papers.

As previously stated hereinabove, he had complete access to all underlying work papers both at my offices and at LIRR offices. Protestant then attempts to discredit the sample by comparing selected sample results with universe results. Comparisons are made for seasons, origins and revenue per carload.1/

There are no significant differences in the traffic and operating characteristics of auto parts by season of the year. If one were studying a commodity where the volume was significantly different over the months of a year, the seasonal characteristics should be considered. However, as shown by the distribution of the universe for 1976, there was a relatively even flow in each month of the year. Thus the variance between the proportion moving in any given month for the sample versus the universe is insignificant.

The traffic universe also shows that 25.6 percent of the cars moved in January, February and December versus 10 percent of the sample cars. As operating conditions are generally more onerous due to bad weather during these three months, my sample would tend to understate the costs when based solely on seasonal influences.

1/ Witness Anderson, Tables 1, 2 and 3.

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Origins

The distribution of the sample data by origin points supports the sample. The sample included all but two origins which accounted for only 2.2 percent of the total traffic. The three major origins of Martinsburg, West Virginia, Pontiac, Michigan and Waterford, Michigan, accounted for 84 percent of the universe and 85 percent of the sample. In this respect the sample is representative of the universe.

Revenues

Table 3 of Witness Anderson's statement attempts to show that the universe revenue per carload is higher than the sample revenue per carload.[1/] This statement is inaccurate and misleading. GM data are not based on the interline abstracts and fail to consider corrections issued by LIRR which reduced revenues. Protestant's witness inaccurately assumes that there were only two rate changes on the LIRR during 1976.

During 1976 five different rate levels applied to auto parts traffic terminating at Bethpage, New York. Rate changes were made on March 6, March 21, April 3 and June 12. A distribution of the time period versus the number of cars is shown below:

1/ Witness Anderson has compared the GM universe with the sample of LIRR universe.

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Rate Levels during 1976	Percent of Carloads[1/]		Distribution of Days in Each Rate Period
	Sample	Universe	
(1)	(2)	(3)	(4)
January 1 thru March 5	13%	20%	18%
March 6 thru March 20	5	6	4
March 21 thru April 2	5	5	4
April 3 thru June 11	22	16	19
June 12 thru December 31	55	53	55
Total	100%	100%	100%

1/ Witness Anderson, Table 1.

The above demonstrates that the distribution of the sample carloads and universe carloads reflects the time distribution of the rate periods throughout the year.

On page 6, Witness Anderson refers to Waybill 153149 dated May 6, 1976, on which total revenues amounted to $409.50. This is alleged to be understated and Witness Anderson states that GM records show a payment of $461.25. The reference to GM records must be carefully considered in light of the sentence following this statement:

> "GMPD considers this the appropriate rate level following the March 21, 1976 rate increase." (Anderson V.S., page 6)

The same misunderstanding of the rate levels applicable during 1976 is used in Tables 9 and 10 wherein Witness Anderson follows a methodology which significantly overstates the revenue/cost ratios. This area will be fully explored later herein.

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A further indication of the overstatement contained in Protestant's evidence is verified by a complete check of all cars from Pontiac, Michigan during 1976. The universe of this traffic shows revenues of $667[1/] per carload as compared with revenues of $679 per carload for the sample traffic. This is a difference of $12 per carload or 1.8 percent.

In summary, the revenues from the involved traffic reflect a random sample taken throughout the year 1976. The data reflect all rate levels in effect during the year, minimum weights to the extent they were applicable, and actual weights which exceeded the minimum as applicable.

TRAFFIC AND OPERATING CHARACTERISTICS

Protestant's witness at pp. 6 through 16 discusses traffic and operating characteristics of the involved traffic on the LIRR. My reply will deal with these subjects under the following topics:

1. Tare Weight
2. Empty Return
3. Train Weights
4. Switching
5. Car Costs
6. Other Costs

1/ GM data results in revenues of $710 per carload (Witness Anderson, Table 3).

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Tare
Weight

The tare weight of 36 tons used in my original study is based on a general service box car equipped. The sample shows that this is the predominant car used for auto parts traffic. Protestant's witness shows that approximately 15 percent of the sample cars are "free runners" and arrives at a tare weight of 33.16 tons. Without further effort to justify the change in tare weight, my restatement of costs includes a tare weight of 33.16 tons.

Empty
Return

Protestant's witness also questions the use of 100 percent empty return for the involved equipment. Most of these cars are required to be returned to origin empty and in my opinion the 100 percent factor is applicable. Protestant's witness refers to the free runners and assumes an Official Territory Region II empty return factor for these cars. He arrives at a weighted average empty return of 96.5 percent (Witness Anderson, p. 7).

A check of each of the 40 sample cars shows that each car was returned empty by LIRR to the connecting railroad. LIRR's empty return was 100 percent. Although based on no study other than assumptions, I have shown the alternative costs resulting from Protestant's use of 96.5 percent empty return for connecting lines.

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Train
Weights

Protestant's witness at pp. 8 and 9 is critical of the train characteristics used in my original study. For purposes of my study, an analysis was made of LIRR trains handling the involved traffic. The primary reason for this analysis was that a major portion of this movement occurred in trains heavier than the system average and use of the system average would understate train weights and overstate the costs. A comparison of the train weights used in my analysis with the system average train weights on the LIRR is shown below:

Item (1)	Trailing Weight (tons) (2)
1. Special study for auto parts traffic	1,024
2. LIRR system average[1/]	510

1/ LIRR Rail Form A.

The use of the system average as shown above would have understated the applicable train weights and overstated the costs.

Protestant's witness also complains that he received only a two page summary of the train weight study. This summary included each day's activity of the involved trains. Specific questions were raised by Witness Anderson concerning the department and personnel responsible for maintaining records used in my analysis. Full and complete information was furnished and he was

told that all basic records were available at the LIRR offices. No further attempt was made by Protestant's witness to see these data.

Protestant's witness at page 9 also makes the statement that:

> "...LIRR figures do not support the Table 2 data shown by Witness Peabody at page 6."

I went over the summary data with Protestant's witness and pointed out that the final figures on trains RF-16 in the loaded direction and RF-11 in the empty direction differed slightly from the initial figures furnished and used in my testimony. A recomputation of these data is shown below:

Item (1)	Miles (2)	Trailing Weight (tons) (3)
Loaded Direction		
1. Fresh Pond-Holban, RF-16	7	5,858[1/]
2. Holban-Wellwood, RF-80	21.3	500
3. Wellwood-Bethpage, RF-64	4.3	561
4. Weighted Average	xxx	1,659
Empty Direction		
5. Bethpage-Wellwood, RF-64	4.3	561
6. Wellwood-Holban, RF-81	21.3	301
7. Holban-Fresh Pond, RF-11	7	840[2/]
8. Weighted Round Trip[3/]	xxx	1,055

1/ Figure used in my original testimony was 5,600 tons.

2/ Figure used in my original testimony was 810 tons.

3/ Simple average of loaded and empty direction.

The restated weight of 1,055 tons is 3 percent higher than the original figure of 1,024 tons used in my testimony. The impact of this change is considered in my restatement of costs.

Switching

Protestant's witness at pp. 9 through 12 refers to a "study" of the switching at Bethpage. What Protestant's witness has actually done is to use some estimates furnished by LIRR witnesses in other proceedings for the time of the crew switching at Bethpage. These data are not based on an on-the-ground study of actual movements as to time and car counts. However, in order to show the impact of Protestant's switching adjustment, I have used the 30.1 minutes per loaded car, which is 80.9 percent of LIRR's system average. This is included in my restatement of costs.

Car
Costs

Protestant's witness at pp. 12 and 13 and in Table 4 refers to three adjustments to the car costs applicable to GM sample carloads. The original study was based on a tracing of all sample cars to determine the applicable per diem rate, mileage rate and number of days on the LIRR. Protestant witness's first adjustment is correct in that three errors were made in the calculation of total car costs. The weighted average difference is a reduction from $30.59 to $29.75 per carload, or 84¢ per carload.

Protestant also adjusts car costs for what is considered to be excessive per diem charges. This is based on a statement of Witness William Burke referred to by Witness Anderson:

> "...on 70 occasions in 1976, LIRR did not switch available empty cars out, resulting in 161 additional per diem days." (Anderson V. S., p. 13)

Protestant's witnesses would substitute their judgment as to when LIRR should perform its switching operations. They totally ignore the expenses that would have been incurred by LIRR to switch the cars on the days to which they refer. I have made no further analysis of the study to support the alleged available empty cars, and such an adjustment is not warranted unless coupled with the assumption and inclusion of additional train, crew, locomotive and other expenses.

Protestant also would reduce car costs for demurrage credits. In other words, Protestant's position is that the penalty demurrage should be used in measuring the profitability of a rate. This completely contradicts the basic purpose of demurrage.

I have accepted the errors calculated by Protestant and this adjustment is included in my restatement of costs.

Other Costs

Protestant also takes exception to the inclusion of certain services for the involved traffic. Such services include:

		Amount per Carload
1.	Special services	$0.72
2.	Loss and damage claims	6.51
3.	Loss and damage clerical claims	3.63

While extremely detailed studies would be required to reflect appropriate adjustments for these categories, I have accepted Protestant's suggested exclusion of these items and my restatement reflects this adjustment.

Protestant also refers to the interchange between the NJII and the NW at Pine. Protestant makes some distinction because the NJII is a Class II railroad. This is an interchange between a Class II line-haul carrier and a Class I line-haul carrier. In the absence of a complete switching study of services performed at this point, I have appropriately used the system average factor. Protestant also refers to one sample carload which was interchanged between the Reading and Penn Central at Belmont. This car moved on January 22, 1976 prior to the merger into ConRail and thus would have received an interchange between the Reading and Penn Central.

OFFICIAL TERRITORY
COSTS

Witness Anderson uses most unusual circular reasoning in attempting artificially to lower the cost incurred by the railroads. At p. 17, he is extremely critical of my use of Official Territory (Regior II) costs for application to movements over Official Territory carriers other than LIRR. He states:

> "These costs represent 25 Official Territory railroads, ranging from the Penn Central to the Monogahela (sic) Railway, and indeed, including the LIRR itself."

He then goes on to point out that only four carriers of Class I magnitude were used, and finally he states:

> "The failure to make Rail Form A applications for the specific connecting line carriers to develop unit costs for a dominant part of the haul renders the entire presentation questionable, especially when such a limited group of carriers is involved." (Anderson, V.S., p. 17)

There were a limited number of Class I line-haul carriers involved. As demonstrated below, ConRail accounted for approximately 90 percent of the total traffic as measured by car-miles. A summary is shown below:

Railroad (1)	Percent of Car-miles Sample (2)	Universe (3)
1. ConRail	89.8%	89.6%
2. LIRR	5.8	5.8
3. N&W	1.8	0.7
4. GTW	2.6	3.9
5. Total	100.0%	100.0%

Of course ConRail's proportion of traffic excluding the movement over the LIRR would be in excess of 90 percent.

The major carrier in the ConRail system is Penn Central (PC). In 1974, PC accounted for 79 percent of both operating revenue and expenses of the Class I railroads which were merged into ConRail on April 1, 1977. A comparison of 1974 Official Territory (Region II) unit costs versus PC unit costs is shown below:

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE LONG ISLAND RAIL ROAD COMPANY

COMPARISON OF 1974 OFFICIAL TERRITORY (EXCLUDING NEW ENGLAND) VARIABLE UNIT COSTS WITH PENN CENTRAL

Item (1)	Official Territory (excl. New England) Region II 1/ (2)	Penn Central 1/ (3)	Penn Central Over/(Under) Region II (4)
1. Variable line-haul per car-mile	48.56532¢	50.59366¢	+ 4.2%
2. Variable line-haul per cwt-mile	0.01703¢	0.01872¢	+ 9.9
3. Variable terminal per carload	$131.31078	$156.63492	+19.3
4. Variable terminal per cwt.	0.03937¢	0.03747¢	(-) 4.8

1/ Variable costs reflect an equipped box car moving in an average train.

As demonstrated above, Penn Central unit costs exceed the Official Territory average by substantial amounts. In only one category is the cost less and this component is negligible in the computation of variable costs. Thus the use of Official Territory unit costs for movement over carriers other than LIRR tends to understate rather than overstate variable costs.

Witness Anderson also objects to the use of LIRR actual costs. At page 18 of his Verified Statement he states:

> "...it can only be characterized as an extremely expensive freight operation."

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

We do not differ with Witness Anderson's statement that freight operations on the LIRR are expensive. My study used the actual expenses as recorded in LIRR records and submitted to the ICC in Annual Report Form R-1. The Rail Form A reflects the standard Rail Form A application to LIRR expenses and the resulting unit costs reflect expenses and operations of the LIRR.

The most astounding feature of Witness Anderson's restatement of costs is that, after condemning the use of Official Territory costs for the movements over four Class I carriers, he then concludes that the appropriate method of costing is to apply Official Territory unit costs not only for the four Class I carriers, but also for the LIRR. Witness Anderson used this procedure after he had demonstrated that LIRR unit costs were different from Official Territory (Region II) unit costs.

Also, in connection with Witness Anderson's restatement of costs for the involved auto parts traffic, he fails to state that in answer to a specific question concerning switching costs, his associate was informed that return on the net investment in road and equipment property had not been included in LIRR's Rail Form A. LIRR's Annual Report Form R-1 does not show long term debt because of state ownership. Thus the Rail Form A

computations did not allow for return on road or equipment property. I have corrected the input to allow for return and my restatement of costs reflects the corrected unit costs.

PROTESTANT'S
RESTATEMENT

Utilizing Official Territory (Region II) unit costs for the four major Class I railroads and for the LIRR, Witness Anderson computes variable costs for the involved auto parts movement. He also constructs revenue for this movement.

Variable costs developed from this analysis must be rejected because of their reliance on Official Territory costs for movements over the LIRR,when the facts show that LIRR unit costs are significantly higher than Official Territory unit costs. Moreover in his attempt to show that this traffic is profitable, he goes to great lengths to overstate revenues.

The summary of this analysis is shown in Table 9 of Witness Anderson's testimony. The note at the bottom of this page states: "Revenue per July 1976." The July revenue level does not reflect the average revenue received by the railroads during 1976.1/ It reflects a revenue level that was maintained through the end of the year. Thus it overstates revenues applicable to the involved traffic during the calendar year 1976.

Witness Anderson's work papers show that he recognized a change in the rate levels during the year. I have used the

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1/ Other factors, e.g., average loading, car types, per diem charges, reflect the average of movements during 1976.

Martinsburg, West Va. origin (carloads originating at Martinsburg account for 65 percent of the sample carloads and 56.8 percent of the universe carloads) for illustrative purposes in demonstrating the overstatement of revenues following Witness Anderson's method.

Time Period (1)	Revenue per Carload (2)
1. First 91 days of 1976	$333
2. Balance of 275 days in 1976	461
3. Weighted Average	429

The above tabulation (from Witness Anderson's work papers) shows that the average revenue for the entire year based on Witness Anderson's methodology is $429 per carload for this movement, not the $461 referred to in Table 9.[1/] However, as demonstrated by LIRR's traffic sample, the actual average revenue was $443 per carload during 1976. This reflects not only the time period in which the cars moved, but also the fact that some cars load in excess of the minimum of 20,000 lbs.

As demonstrated hereinabove, there were actually five time periods during 1976 when different rates were in effect. These periods are reflected in the sample of LIRR traffic based on the actual interline abstracts used to settle the revenue among involved carriers.

1/ The ratio of the inflated revenues to understated costs (Official Territory) for the movement accounting for 57 percent of the universe carloads is 0.8969 (Anderson, Table 9).

Thus Witness Anderson, by distorting both variable costs and revenues, attempts to show that this traffic is profitable. However, using his own figures in Table 9, the weighted ratio of revenues to variable costs ranges from 0.93 to 0.95 depending on whether the ratios are weighted by universe or sample carloads.

The final attempt to show that this traffic is profitable is shown in Witness Anderson's Table 10. The only change between Table 9 and Table 10 is that the revenues have been further inflated. This inflation purports to recognize the fact that the weight in some carloads is in excess of the minimum. However, as stated hereinabove, the LIRR sample carloads reflect not only the time period in which the car moves, but also the actual pounds of lading if in excess of minimum for purposes of computing carload revenues.

OTHER OFFICIAL TERRITORY
MOVEMENTS OF AUTO PARTS

The balance of Witness Anderson's statement on pp. 22 through 27 deals with movements of auto parts to other points in Official Territory. As the involved traffic to Bethpage is not considered in this analysis, I have made no attempt to study the procedures followed or to verify the results.

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

The fact that auto parts traffic is extremely profitable or unprofitable is not germane to the measure of the profitability of auto parts traffic to the GM plant at Bethpage, New York served by the LIRR. As my study shows, the revenues received from this traffic during 1976 fail by a substantial margin to cover the variable costs incurred by the railroads in handling this traffic.

SUMMARY

As stated hereinabove, certain of the modifications made by Witness Anderson are incorporated in my restatement of the rail variable costs of moving auto parts traffic to the GM plant at Bethpage, New York. Specific adjustments include the following:

1. Decrease in tare weight from 36.0 tons to 33.2 tons.
2. Decrease in empty return over the Official Territory carriers other than the LIRR from 100 percent to 96.5 percent.
3. The correction of trailing weights of LIRR trains handling the involved traffic from 1,024 tons to 1,055 tons.
4. LIRR switching costs at destination of 80.9 percent of system average.
5. Correction of LIRR car costs to reflect errors in original computation.

6. Elimination of special services, loss and damage clerical claims and loss and damage claim expenses.

7. Inclusion of return on road and equipment property in LIRR Rail Form A.

8. Origin detention time reduced to reflect 24 hours for loading in Official Territory.

The results of this restatement are shown in the tabulation below:

Relationship of Revenues to Variable Costs

Item (1)	Average Revenue per Carload (2)	Variable Costs per Carload (3)	Ratio of Revenues to Costs (Col. 2 ÷ Col. 3) (4)
1. Carriers other than LIRR	$278	$406	0.6847
2. LIRR	222	383	0.5796
3. Total	500	789	0.6337

The average variable costs for carriers other than LIRR are modified from $440 to $406 per carload. Variable costs on the LIRR are modified from $412 to $383 per carload, resulting in a change in variable costs for all carriers of from $852 to $789 per carload.

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY

The impact of the changes in variable costs per carload is a change in the ratio of revenues to costs as follows:

Item (1)	Ratio of Revenues to Costs	
	Original Statement (2)	Restatement (3)
1. Carriers other than LIRR	0.63	0.68
2. LIRR	0.54	0.58
3. Total	0.59	0.63

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
LONG ISLAND RAIL ROAD COMPANY
VERIFICATION

STATE OF MARYLAND)
) SS:
COUNTY OF PRINCE GEORGE'S)

LEROY E. PEABODY, JR., being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Leroy E. Peabody, Jr.

Subscribed and sworn to
before me this 20th day
of April 1977.

Notary Public
My Commission Expires 7/1/78

NOTICE OF DETERMINATION OF MARKET DOMINANCE, FILED MAY 4, 1977.

NOTICE OF DETERMINATION OF MARKET DOMINANCE

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C. on the 28th day of April, 1977.

No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAIL ROAD

It appearing, That section 1(5)(b) of the Interstate Commerce Act, as added by section 202 of the Railroad Revitalization and Reform Act of 1976 (Public Law 94-210) requires a determination of market dominance before the Commission may declare a rate unjust and unreasonable on the ground that the rate exceeds a just or reasonable maximum for the service rendered or to be rendered;

It further appearing, That section 1(5)(c)(i) of the Act described "market dominance" as an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and in (ii) a rate means any rate or charge for the transportation of persons or property;

It further appearing, That this investigation involves new charges in connection with the maintenance of private siding switch connections at the General Motors Corporation plant at Bethpage, N.Y., on the line of Long Island Rail Road Company;

And it further appearing, That the investigated charge is for service solely at the General Motors' Bethpage plant, served by the Long Island Rail Road alone; that the evidence of record indicates that as to the General Motors' Bethpage plant, the Long Island Rail Road handles 100 percent of the switch movements; and that the Long Island has not offered any evidence to show that it does not possess market dominance on the movements in question;

Wherefore and for good cause appearing therefor:

It is determined, That the Long Island Rail Road has market dominance for the movements to which the increased charges apply.

By the Commission, Division 2, Commissioners Hardin, Murphy, and Clapp.

ROBERT L. OSWALD
Secretary

(SEAL)

REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED SEPTEMBER 7, 1977.

Served September 7, 1977

30945

INTERSTATE COMMERCE COMMISSION

No. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAILROAD

Decided August 26, 1977

A separate charge for maintaining a switch connection on a private sidetrack of General Motors Corporation at Bethpage, N.Y., found not shown to be just and reasonable. Proceeding discontinued.

George M. Onken, Richard H. Stokes, and *Walter J. Myskowski* for respondent.

Dennis J. Helfman and *Benson T. Buck* for protestant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, MURPHY, AND CLAPP

BY DIVISION 2:

The modified procedure was followed. Due and timely execution of our functions under section 15(8) of the Interstate Commerce Act imperatively and unavoidably requires the omission of an initial decision in this proceeding.

By schedule filed to become effective January 31, 1977 (after postponement of initial effective date of January 15, 1977), the Long Island Railroad Company (respondent or LIRR) published LIRR Freight Tariff 72, ICC 1119, proposing a maintenance charge for operating a switch connection on a private sidetrack of General Motors Corporation (protestant or GM) at Bethpage, N.Y. Respondent sought to require protestant to bear the entire expense of maintaining both the switch connection and that portion of the sidetrack located within its right of way, at the Bethpage facility. Upon protest filed by GM, the Commission did not suspend, but instituted an investigation into the lawfulness of the proposed rate.

The principal issue is whether the proposed rates are just and reasonable. Respondent has the burden of proof. Evidence in support of the schedules was submitted by respondent, in opposition

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by protestant, and in reply by respondent. Pursuant to a Notice of Determination of Market Dominance, served by division 2 on April 28, 1977, respondent was found to have market dominance of the subject traffic.

Respondent's evidence.—The reason for the proposed charge, according to respondent, is primarily the need for additional revenues to meet increased costs of maintaining a switch connection. In this regard, respondent contends that it is sustaining increases in cost levels far in excess of revenues sought in this proceeding. Respondent claims that it is entitled to reasonable compensation for the cost of maintaining a switch connection under section 1(9) of the act, citing in support *Allied Container Corp.* v. *Maine Central Railroad Co.*, (not printed), decided October 27, 1976. Respondent submits that the rate in question will be assessed only where no contractual agreement exists. At present, protestant is the only shipper which refused to enter into a contractual agreement for the maintenance of the switch connection.

Further, respondent presents cost evidence relating to movements on its own lines and on the lines of connecting carriers. In developing its data, respondent estimated an annual maintenance cost of $1,808. This amount consists of the following expenses: depreciation, inspection, lubrication, snow removal and general maintenance, as shown in table 1.

TABLE 1[1]

	Costs
1. Depreciation	$608
2. Inspection, lubrication, snow removal	600
3. General maintenance	600
Total	1,808

[1]These figures are based on an average cost, excluding depreciation which was based on current construction costs of $30,400 over a life expectancy of 25 years, and which result in one-half the annual charge of $1,216 (or $608).

Respondent contends that this total amount is almost equal to the $1,887.30[1] which protestant would have had to pay at the proposed

[1]This total should be adjusted to $1,769.17 (403 x $4.39)

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rate of $4.39 per car if it was assessed on the 403 cars received at the Bethpage plant in 1976.

Respondent maintains that its existing line-haul rates do not cover the full costs of maintenance expenses. To illustrate, respondent developed revenue-cost ratios for auto parts traffic from various origins in official territory to Bethpage. Based on this study, respondent concluded that the overall ratio of revenue-to-variable cost on this traffic studied is 59 percent. It is stated that respondent's share for its segment of the traffic was 54 percent while the share for other carriers was 63 percent. See table 2 below.

TABLE 2

LIRR's revenues and costs for Bethpage, N.Y. traffic

Item	Average carload revenue	Variable cost per carload	Ratio of revenue to cost column 1 ÷ column 2
(1)	(2)	(3)	(4)
			Percent
1. Carriers other than LIRR	$278	$440	63
2. LIRR	222	412	54
3. Total	500	852	59

Respondent took a 10-percent sample from 403 carloads of auto parts destined for GM's facility in 1976, resulting in 40 sample carloads. These 40 carloads had 7 different origins. This sample consisted of cost information including route of movement, billed weight, actual weight shipped, car type, and revenue breakdown by railroad. Respondent received each of those shipments at Fresh Pond, N.Y., from ConRail, and moved them 33 miles to its destination at GM's Bethpage plant. Respondent averaged the trailing weight for the movement of a car (loaded and unloaded) from Fresh Pond, to Bethpage and return. However, respondent does not show how these results were obtained.[2]

Respondent assessed car costs for the LIRR portion of each movement based on per diem and mileage rates paid by LIRR for

[2] An average revenue per carload of $278 for carriers other than the LIRR and $222 for LIRR, amounting to $500 total carload revenue.

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each movement. The weighted average cost incurred for per diem and mileage costs was computed at $30.59 per car.

All cars involved were boxcars—general service, equipped. The weight paid for (billed weight) was used for the purpose of determining revenue and the actual weight shipped was used for the purpose of determining costs. The average tare weight used was 36 tons, taken from ICC Statement No. 1C1-74, *Rail Carload Cost Scales, 1974.*

Respondent applied unit costs to the traffic and operating characteristic developed from an application of Rail Form A, Statement No. 1F1-63, *Formula for Use in Determining Rail Freight Service,* to the 1975 expenses and statistics of the LIRR. These costs were updated to reflect a July 1976 level on the LIRR portion of each movement. Variable costs for the other involved carriers were based on territorial average costs (official territory, excluding New England), region III, as taken from ICC Statement No. 1C1-74, *Rail Carload Cost Scales, 1974,* indexed to the July 1976 level. The method used in updating the 1974 costs was not indicated nor was the specific update ratio developed by the respondent shown. Also, respondent did not indicate its specific method of cost computation.

Respondent submits that no interchange cost was included for the interchange between LIRR and ConRail at Fresh Pond Junction, N.Y. However, respondent contends that Rail Form A counts these cars as cars interchanged, and allocates a portion of switching expenses to this type of switching. Consequently, respondent asserts that LIRR's costs for other types of switching are understated.

Protestant's evidence.—Protestant generally assails respondent's cost analysis as deficient in many respects. It alleges that rail operating costs alone are nondeterminative in measuring maximum reasonableness; that the rates on auto parts traffic are at a high level; that respondent's cost-revenue comparisons are incorrect, faulty and unreliable; and that the existing rates are adequately compensatory. Furthermore, it attributes respondent's financial dilemma to its ratemaking and operating practices rather than to its existing line-haul rates.

Specifically, protestant states that the principal issue in this proceeding is whether the maintenance charge coupled with the line-haul rate exceeds a maximum reasonable level. In determining the maximum reasonableness of a rate, protestant contends that neither rail operating cost alone nor cost data is a proper standard, citing as support *Class Rate Investigation, 1939,* 262 I.C.C. 447, 693

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(1945), *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, 545 (1964), and *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625 affirmed *General Motors Corp.* v. *New York Central R. Co.*, 207 F. Supp. 641 (E.D. Mich. 1962).

In addition, protestant submits that the publication of a separate charge for service already included in the line-haul rate is simply an increase in the total charge to the shipper. Moreover, this increase will effectuate an additional compensation for maintenance of a facility which respondent is obligated to as a common carrier. This duty of a carrier has long been recognized by the Commission in *Valley & Siletz R. R. Co.* v. *S. P. Co.*, 53 I.C.C. 397 (1919), and in *Anaconda Copper Mining Co. Terminal Service*, 266 I.C.C. 387 (1946). Further, protestant adds that respondent's obligation extends to the cost of constructing and maintaining a switch connection, citing *Merchants Refrigerating Co.* v. *New York Central R. Co.*, 238 I.C.C. 599 (1940), and section 1 (41, 49 USC §1(4)).

Protestant submits that rail revenue contribution studies (otherwise "burden studies") by the Commission are the best indicator in measuring rates on specific commodities to railroad revenue in general. In addition, protestant submits that these studies are based on the most reliable information available, citing *Increased Freight Rates, 1956*, 298 I.C.C. 279 (1956), and *Increased Freight Rates, 1958*, 304 I.C.C. 289 (1958). According to the current burden studies, protestant submits that automotive traffic has produced higher freight rates and has greatly contributed to carrier's revenues, citing as support, *Increased Freight Rates and Charges, 1972*, 341 I.C.C 290 (1972).

In opposing the increase, protestant also submits that respondent's cost-evidence comparisons are inadequate because its sampling cannot be verified. It notes that traffic movement revenue is understated and the rail costs are overstated. In 10 instances, protestant found that its records indicated a higher charge than respondent's cost study reflected. With regard to sampling, protestant points out that only 6.7 percent of the sample carloads occurred in May, while the sampling universe showed 17.5 percent of the movements were in May. Several alleged costing discrepancies were noted by protestant. Among others, protestant states that the latest AAR data indicated that the average tare weight is 33.16 tons, almost 10 percent less than respondent's cost study showed

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TABLE 3[1]

Protestant's comparison of per carload variable cost and revenue on Bethpage movements

Parts plant	Cost	Revenue	Ratio
Flint, Mich. 01	$699	$727	1.0401
Do 02	691	727	1.0521
Martinsburg, W. Va.	514	461	0.8969
Toledo, Ohio	600	734	1.2233
Pontiac, Mich	700	727	1.0386
Lansing, Mich	718	758	1.0557
Drayton Plains, Mich	702	727	1.0356
S & V 1, Flint, Mich	696	727	1.0445
S & V 2, Flint, Mich	696	727	1.0445
A P, South Bend, Ind	725	814	1.1228
K-H, Olney, Pa	418	322	0.7703

[1]Note: Revenue per July 1976 rates.

In table 3 above, protestant contends that, for 9 of the 11 origins studied, the revenue exceeds variable cost by narrow margins, except at Martinsburg, W. Va., and Olney, Pa. For these exceptions, protestant contends that the high cost is the direct result of circuitous routing. To illustrate this point, protestant proffers that the short-line rail distance from Olney, Pa. to New York City is 91 miles, while the actual routing from Olney to Selkirk, N.Y., and then to New York City, is 368 miles, representing a circuity factor of 30.4 percent.

Protestant states that while the average lading weight over the year is less than 10.0 tons, the average revenue per car may actually exceed that for the 20-ton minimum weight. In examining respondent's 40-car sample, protestant found that this was true in 6 out of 40 cases. For this reason, the average billed weight may exceed 20 tons. To reflect the actual billing as applicable, protestant has restated the average revenue per car based on the 1976 experience of the revenue per car paid in excess of the minimum. Table 4 below shows protestant's revenue-cost ratios restated to reflect this change. In comparing table 4 to table 3, it is noted that revenue and hence the ratio of revenue-to-variable cost are adjusted upward for 6 of the 11 origins. Also noteworthy, is the fact that the ratio of revenue-to-variable cost for the Martinsburg, W. Va., origin improves from 89.69 percent in table 3 to 96.44 percent in table 4.

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TABLE 4[1]

Protestant's restated comparison of per carload variable cost and revenue on Bethpage movements

Parts plant	Cost	Revenue	Ratio
Flint, Mich. 01	$699	$810	1.1588
Do 02	691	727	1.0521
Martinsburg, W. Va	514	506	0.9844
Toledo, Ohio	600	734	1.2233
Pontiac, Mich	700	764	1.0914
Lansing, Mich	718	758	1.0557
Drayton Plains, Mich	702	788	1.1225
S & V 1, Flint, Mich	696	731	1.0503
S & V 2, Flint, Mich	696	801	1.1509
A P, South Bend, Ind	725	814	1.1228
K-H, Olney, Pa	418	322	0.7703

[1]Note: Revenue per July 1976 rates and 1976 loading experience.

Protestant maintains that the movements of auto parts to Bethpage are only a small part of the total traffic of this commodity. Protestant has 11 parts plants in the U.S. These 11 plants loaded 19,494 carloads in 1976 to 26 parts distribution centers throughout the Nation, including Bethpage. The top six of these parts plants accounted for 16,014, or 82 percent of these carloads.

Protestant has developed the average lading, routing, and mileages for movements from the 6 dominant origins to all of the 11 parts distribution centers. Based on this information, protestant has calculated the variable cost per car using region II unit costs from ICC Statement No. 1C1-74, *supra*, and other applicable factors and adjustments set forth previously in the costing of movements to Bethpage. The cost per carload was then compared to the July 1976, revenue for each movement. The results are shown in protestant's table 18 (V.S. of William E. Anderson). These results show that 62 of the 65 movements studied have revenue exceeding variable cost. Protestant states that this demonstrates that the rate structure governing the revenue for the movement of vehicle body parts and accessories over the entire official territory provided rail carriers with revenue contribution above variable costs in almost all of the movements studied.

Finally, protestant attributes respondent's financial dilemma to its ratemaking and operating practices rather than to its existing line-haul rates. This is exemplified, protestant asserts, by numerous examples of questionable ratemaking, operating and management practices which seem to be the real cause.

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Respondent's rebuttal evidence.—In reply, respondent questions protestant's contentions and points out the failure of protestant to dispute the reasonableness of the separate switch maintenance charge, by contending that the estimated annual costs or the amount of the per car charges are too high.

TABLE 5

Item	Ratio of revenues to costs
1. Sample ratio	0.5866
2. Standard error	0.0172
3. 95 percent confidence interval	0.0341

In table 5 above, respondent computed the standard error for the ratio of revenues to variable costs. The 95-percent confidence interval demonstrates that the range in the ratio of revenue to variable costs is from 55.25 percent to 62.07 percent.

Respondent responds to protestant's criticisms of its sampling of movements to Bethpage by stating that the distribution of the sample data by point of origin supports the sample. For example, the three major origins of Martinsburg, W. Va., Pontiac, Mich., and Waterford, Mich. accounted for 84 percent of the carloads in the universe and 85 percent of the sample carloads. Respondent also alleges that there are no significant differences in the traffic and operating characteristics of auto parts by reason of the year. Thus, seasonal characteristics need not be considered. Further, respondent maintains that protestant's statements that revenue in the sample is understated are incorrect. It is alleged that GM data are based on interline abstracts and fail to reflect corrections issued by LIRR which reduced revenues.

In response to protestant's criticism with regard to traffic and operating characteristics, respondent made the following statements:

1. That protestant's use of a tare weight of 33.16 tons per car is more acceptable and is used in respondent's restatement.

2. That protestant's empty-return ratio of 96.5 percent rather than the 100-percent ratio initially used is more acceptable even through a check of the 40-sample cars shows that each car was returned empty by respondent to the connecting railroad.

3. That the average trailing weight for trains moving this traffic in the LIRR was recomputed from 1,024 tons to 1,055 tons which respondent uses in its costs restatement.

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4. Respondent has accepted protestant's first adjustment to car costs, resulting in a reduction of the car cost per carload from $30.59 to $29.75. Respondent also accepts protestant's allegation that special service costs, loss and damage claims should be excluded from the costs of the subject traffic. Respondent also accepts the reduction of origin detention time to reflect 24 hours loading and protestant's figure of switching minutes per car of 30.1 minutes.

However, respondent defends its use of official territory costs for that portion of the traffic moved by other carriers, and maintains that this does not overstate costs, as protestant alleged. Respondent states that ConRail moves over 90 percent of the traffic in terms of car-miles for the portions of the movements on carriers other than respondent. In addition, respondent compares the 1974 unit costs for the Penn Central and the official territory (region II) from ICC Statement No. 1C1-74, *supra*. This comparison shows that Penn Central's unit costs were higher for three of the four unit costs shown. The only category where region II costs were higher was variable terminal costs per hundredweight, a cost which respondent states is a very minor component of overall variable costs. Thus, respondent states the use of regional costs has understated costs, rather than overstated costs, as implied by protestant.

Respondent assails protestant's restatement on two main points: First, respondent states that protestant used region II costs for the LIRR portion of each movement even though LIRR's costs were available; and second, respondent states that protestant used the July 1976 revenue level rather than the average revenue during 1976 resulting in an overstatement of revenue. For example, respondent suggests that the average revenue per carload for movement of auto parts from Martinsburg, W. Va., to Bethpage, N.Y., was $333 for the first 91 days of 1976 and $461 for the remaining 275 calendar days, yielding a weighted average carload revenue of $429. Therefore, protestant's use of $461 total is simply an attempt to inflate revenues further for carloads that load in excess of the minimum weight.

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TABLE 6

Respondent's restatement of revenues and variable costs

Item (1)	Average revenue per carload (2)	Variable costs per carload (3)	Ratio of revenue to costs col. 2 ÷ col. 3 (4)
			Percent
1. Carriers other than LIRR	$278	$406	68.47
2. LIRR	222	383	57.96
3. Total	500	789	63.37

Finally, respondent submits that the profitability of auto parts traffic throughout the official territory is not germane to this proceeding. The traffic at issue, respondent restates, fails by a wide margin to generate revenue which covers variable cost, as shown in table 6 above.

DISCUSSION AND CONCLUSIONS

The primary issue is whether the establishment of a separate charge for services previously performed as a part of the line-haul rates is just and reasonable. The reasonableness of the proposed charge cannot be properly determined here without reference to the reasonableness of the line-haul rates, and the services performed thereunder. It is respondent's burden to establish the reasonableness of the rate increases.

With regard to the lawfulness of a separate maintenance charge, respondent contends that it has met the requirements enunicated in docket No. 35790, *General Motors Corp., Long I. R. Priv. Sidetrack*, 351 I.C.C. 691 (1976). In that case, both parties in this proceeding joined in a petition for a declaratory order as to which should bear the entire cost of maintaining a switch connection, including the right of way of respondent. The Commission held that LIRR could not condition service on GM's private sidetrack to Bethpage's facility upon the execution of a sidetrack agreement obligating the industry to bear the entire expense. However, the Commission did not state that LIRR was forever precluded from establishing separate maintenance charges. It stated at page 698 of the report:

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Such charges, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, *or a showing that the existing level of line-haul rates is reasonable*, despite the additional charge *for maintenance*, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial. [Emphasis added.]

After the issuance of this report, the U.S. District Court for the Eastern District of New York issued a permanent injunction against LIRR, restraining it from ceasing service at GM's Bethpage siding because of GM's refusal to execute LIRR's standard sidetrack agreement. An appeal was made by LIRR which was deferred pending the outcome of this investigation on the proposed maintenance charge. Thus, LIRR can, under the holding of docket No. 35970, lawfully impose a separate maintenance charge if the above-described conditions are met.

With regard to the existing line-haul rates, protestant assails the overall level of respondent's rates as being historically and unreasonably high in comparison to the level of rates in the same and surrounding areas. In support, protestant submitted cost comparisons with similar rates on this traffic. Respondent claims that the existing line-haul rates are not unreasonably high, and, in fact, are well below variable cost.

There are two major differences between the revenue-cost comparisons shown by respondent in table 6, and by protestant, in table 4. The first involved the derivation of carload revenue, while the second relates to respondent's usage of individual carrier costs, as opposed to protestant, which used regional average costs for the LIRR portion of each movement, resulting in lower costs and higher revenue-cost ratios.

Protestant has criticized respondent's application of LIRR 1975 unit costs to the portion of each movement which is carried by the LIRR. Protestant's only reason for this criticism is that LIRR's freight operations are extremely expensive. Protestant has not questioned the accuracy or the correctness of the 1975 LIRR unit costs. Rather, it merely contends that such costs should be excluded from the record because they are high.

Since the actual working papers and the individual unit costs are not part of the record, the accuracy of such costs cannot be ascertained. However, under the assumption that such costs have been correctly computed, they are preferable to regional average costs for movements over the LIRR. The mere fact that unit costs for an individual carrier are high does not exclude those costs from

consideration. Based on respondent's description of the costs it included in the line haul and terminal components of variable costs, respondents procedure in determining its costs appears to be reasonable.

Respondent has not shown unit costs for the LIRR in 1975. However, it has been our experience that LIRR's unit costs exceed region II unit costs by wide margins. Shown below in table 7 are selected unit costs for the LIRR in 1975 compared to the same region II 1974 costs. These unit costs are for an equipped, general service boxcar, moving in an average weight train. The LIRR unit costs are based on a 1975 Rail Form A application to LIRR's operations. The region II unit costs have been taken from table 3 of ICC Statement No. 1C1-74, *supra.*

TABLE 7

Comparison of selected unit costs for LIRR and region II

Item	LIRR	Region II
	1975	1974
(1)	(2)	(3)
	(Costs stated in cents)	
Car-mile cost	888.943	48.565
Hundredweight-mile	.31929	.17030
Terminal carload cost	36213.305	13131.078
Terminal hundredweight cost	.03315	.03900

As can be seen in the above table, the unit costs for the LIRR are much higher than the corresponding region II unit costs, except for the terminal cost per hundredweight, which is a relatively minor component of total cost. Even if the 1974 region II costs were to be updated to the 1975 level, similar large differences would still remain.

A second major point of difference which has been left unresolved in the restatements of the two parties has centered on the question of carload revenue. Respondent, by using the revenue obtained from railroad abstracts, has developed a carload revenue for each movement which reflects the average revenue received over the course of the year. Protestant, on the other hand, has shown revenue at the July 1976 rate level.

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It is our view that the most accurate determination of the revenue-cost relationship for this traffic would be at the July 1976 level. Revenues reflecting the average revenues received over the course of the year would not be as precise.

For the reasons stated above respondent's method of determining costs are preferable to those shown by protestant. Using those costs it is evident that revenue fails to cover variable cost for this traffic. Table 8 below shows protestant's and respondent's revenues, costs, and revenue-cost ratios for this traffic. Respondent's results are the same restated results shown in our table 5. Protestant's results are the weighted average results computed from the protestant's individual movement results, shown in our table 3. The results for each movement have been weighted by the number of carloads handled in 1976 from each origin.

TABLE 8

Comparison of respondent's and protestant's results

Item	Protestant	Respondent
Revenue per carload	$602	$500
Variable cost per carload	580	789
Ratio of revenue to variable cost------(percent)	103.8	63.4

As can be seen in the above table, even if protestant's results were used, the ratio of revenue-to-variable cost of 103.8 percent indicates that the revenues barely cover variable cost. Using respondent's costs it can be seen that the revenue per carload falls well below variable cost. For example, using protestant's carload revenue of $602 and respondent's costs of $789 produces a revenue-to-variable cost ratio of only 76.2 percent.

The fact that the line-haul rates fail to cover the variable costs of this traffic, however, does not in and of itself justify the proposed maintenance charge. As we stated in docket No. 35790, *supra*, it is up to respondent to show that the proposed separate maintenance charges are reasonable and nondiscriminatory.

Respondent has failed to substantiate that the maintenance charge of $4.39 per car is a reasonable charge for the cost of maintenance of the switch connection at Bethpage. Specifically, respondent has not introduced any evidence on the record to support either its estimate of the cost for inspection, lubrication, and snow removal

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($600 per year), or its estimate of the cost for general maintenance of the switch ($600 per year). Thus, no determination can be made from the evidence of record as to the adequacy or accuracy of either estimate.

Protestant's contention that such maintenance costs would be included in its operating expenses, such as Maintenance of Way and Structures, is correct. Therefore, as protestant contends, LIRR's unit costs would be overstated. If the proposed maintenance charge were applied only at one facility, such as at Bethpage, the impact of any such overstatement on unit costs would be negligible. However, since respondent indicates in its opening statement that at least 169 such agreements have been made with other shippers, the magnitude of any overstatement in unit costs would be significant.

Protestant has asserted that respondent should not have estimated the construction cost of the switch connection since the actual construction costs should be available. In addition, protestant has questioned the inclusion of such costs as "depreciable construction costs," since the cost of rail and track material cannot be depreciated.

In this regard, we agree with protestant. Respondent should have been able to produce actual construction costs, rather than relying on current replacement costs to develop an estimate of 1965 construction costs. In addition, protestant is correct in its assertion that such costs are not depreciable.

The costs for inspection, lubrication, and snow removal and costs for general maintenance of the switch connection are expenses which would be recoverable in a proposed maintenance charge. However, respondent has not properly supported the cost estimates on the record. In addition, the recovery of such costs would require a corresponding reduction in Maintenance of Way and Structure expenses. This reduction would result in lower line-haul costs for each movement costed out in respondent's cost study.

The estimate of depreciable expense not only has not been computed properly, but is not properly includable as a cost of maintenance of the switch connection.

Thus, the charge of $4.39 per car has not been properly supported by respondent and from the evidence presented we are unable to determine what a reasonable level for a maintenance charge would be.

Despite the showing that the existing line-haul rates do not cover variable costs, based on the above, and taking into consideration the

REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED SEPTEMBER 7, 1977

findings in docket No. 35790, *supra*, we find that respondent has failed to meet its burden of proof and that the proposed maintenance charge has not been shown to be just and reasonable. We further find that the decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN did not participate.

It is ordered, That respondent be, and it is hereby, notified and required to cancel, on or before 35 days from the date of service of the report and order, the schedules described in the order of January 28, 1977, by the Commission, Suspension and Fourth Section Board, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the act; and that respondent refund any amounts collected pursuant to such rates during the period of the investigation.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

NOTICE: By this order, this proceeding is rendered administratively final in conformity with section 15(8)(a) of the Interstate Commerce Act and within the meaning of section 704 of the Administrative Procedure Act.

By the Commission, Division 2.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

355 I.C.C.

PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAIL ROAD

PETITION OF RESPONDENT THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY OF THE EFFECTIVE DATE OF COMMISSION ORDER REQUIRING LIRR TO CANCEL ITS CHARGES CONTAINED IN LIRR TARIFF 72 ICC 1119 PENDING JUDICIAL REVIEW IN THE UNITED STATES COURT OF APPEALS OF SAID ORDER

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PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAIL ROAD

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Comes now The Long Island Rail Road Company [hereinafter LIRR] and petitions this Commission pursuant to Rule 102 of the Commission's General Rules of Practice to modify its order served September 7, 1977 (dated August 26, 1977) which requires respondent LIRR, on or before 35 days of its service date, to cancel its rail schedules naming charges for maintenance of private siding switch connections at the General Motors Corporation [hereinafter GM] plant at Bethpage, New York, on the line of LIRR as published in Tariff 72, ICC 1119 of the LIRR. Respondent asks that the date for cancellation of this tariff be stayed until the United States Court of Appeals has ruled in the pending review proceedings. In support of this petition, respondents respectfully state as follows:

PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977

BACKGROUND OF THIS PETITION

Prior to 1954, LIRR's practice was to require industries to bear the entire cost of maintaining private sidings and switch connections. This policy was changed in 1954 in order to meet competition and to attract additional industry to Long Island. In September 1970, due to soaring deficits from freight operations, LIRR returned to its previous policy which required industries to bear the entire cost of maintaining the private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before GM refused to execute the same type of contract signed by other shippers or receivers. LIRR then refused to service the GM private siding at Bethpage, N. Y. and litigation ensued before the U.S. District Court for the Eastern District of New York and before the Commission. Upon referral from the District Court, in its report and order on reconsideration in Docket #35790, General Motors Corp., Long I.R. Priv. Sidetrack, 351 ICC 691, the Commission's Division 3 ruled that, on the evidence of record, LIRR could not impose the proposed maintenance charge on GM. Division 3 emphasized, however, that LIRR was not forever precluded from establishing separate maintenance charges for switch connections to private sidings. According to Division 3, such charges had to be predicated upon a showing that the existing level of line haul rates is reasonable despite the additional maintenance charge, and that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential and nonprejudicial.

PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977

The United States District Court for the Eastern District of New York, based upon the opinion of the Commission, issued a permanent injunction against LIRR restraining it from ceasing service at GM's Bethpage siding because of GM's refusal to execute LIRR's standard sidetrack agreement. An appeal was taken by LIRR to the United States Court of Appeals for the Second Circuit, the prosecution of which appeal was deferred indefinitely.

After the aforementioned ruling of Division 3 in Docket #35790, LIRR published Freight Tariff 72, ICC 1119, to become effective January 15, 1977, which established a per car maintenance charge at GM's Bethpage plant. A late protest was filed by GM and the effective date of the tariff was postponed to January 31, 1977.

The Commission's Suspension and Fourth Section Board, by order dated January 26, 1977 and served January 28, 1977, declined to suspend the tariff but ordered the institution of an investigation which was held under the modified procedure by order of the Commission.

After the submission of opening and reply statements and argument by LIRR and GM, the Commission issued a final decision and order dated August 26, 1977, and served on September 7, 1977. Said order requires LIRR, on or before 35 days from its service date, to cancel its per car maintenance charge upon the GM facility at Bethpage, N. Y., as published in LIRR Tariff 72, ICC 1119 and to refund any amounts collected

under this tariff during the period of the Commission's investigation.

LIRR is petitioning the United States Court of Appeals for the Second Circuit for review of this order of the Commission as well as the final order of the Commission in Docket #35790.

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. The Commission order in Docket #36516 requires LIRR to cancel its per car maintenance charge for the switch connection and siding upon its right of way at the GM plant in Bethpage, New York, as published in LIRR Tariff 72, ICC 1119 and to refund all sums collected under this tariff during the Commission's investigation.

LIRR would suffer irreparable harm in the event that the Court of Appeals should set aside this order of the Commission since LIRR has a huge freight deficit and would be unable to recover the monies presently provided by the existence of LIRR Tariff 72, ICC 1119. In addition, LIRR would have been put to the expense of cancelling this tariff by the filing and posting required by section 6 of the ICC Act and the further expense of subsequently republishing this tariff for a second time.

2. By contrast, the granting of respondent's present petition to stay the date for cancellation of LIRR Tariff 72, ICC 1119 would not result in any injury or prejudice whatsoever to GM or to any other party but would merely preserve the status quo.

PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977

The Commission could condition the grant of a stay upon the obligation of the LIRR to refund any amounts collected by LIRR pursuant to its Tariff 72, ICC 1119 in the event the Order of the Commission in Docket #36516 is affirmed by the Court of Appeals. Such a refund procedure could be quickly implemented since the tariff is limited to locations served by private sidings where no contractual arrangement exists for the maintenance of a switch connection to such siding.

CONCLUSION

For the foregoing reasons, the date for cancellation of LIRR's Tariff 72, ICC 1119 should be stayed until the Court of Appeals for the Second Circuit has ruled in the pending judicial review proceedings.

Respectfully submitted,

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DATED: October 4, 1977

PETITION OF THE LONG ISLAND RAIL ROAD COMPANY FOR A STAY, FILED OCTOBER 5, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition of Respondent for Stay of Effective Date of Order Requiring Cancellation of its Charges Contained in LIRR Tariff 72, ICC 1119, Pending Judicial Review in the United States Court of Appeals of said Order, upon all parties of record by mailing a copy thereof in accordance with Rule 22 of the General Rules of Practice and Procedure.

Dated at Jamaica, New York, this 5th day of October, 1977.

Richard H. Stokes

Attorney for Respondent

ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED OCTOBER 14, 1977.

NO. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N.Y., LONG ISLAND RAILROAD

In docket No. 35790, General Motors Corp., Long I. R. Priv. Sidetrack, 351 I.C.C. 691 (1976), the Commission found that while the LIRR could not condition service to GM's private sidetrack upon the execution of a sidetrack agreement, obligating the industry to bear the entire expense, the railroad could establish separate maintenance charges. To be lawful, the separate maintenance charges would have to be reasonable, and nondiscriminatory, nonpreferential, and nonprejudicial. In addition, the existing line-haul rates would have to be shown reasonable in conjunction with the separate maintenance charge or the line-haul rates would have to be reduced to correspond with the separate maintenance charge.

This proceeding resulted from the tariff filing of the LIRR which, in accordance with No. 35790 sought to impose on G.M., in the form of maintenance charges, the entire expense of the private sidetrack operation. The Commission did not suspend, but an investigation into the lawfulness of the proposed rates was instituted. Under section 15(8) of the Interstate Commerce Act, respondent was required to keep an account of all monies received.

In docket No. 36516, the Commission found the proposed separate charge for maintaining the switch connection at the private sidetrack not shown just and reasonable. Respondent was ordered to cancel the charge on or before October 12, 1977, upon not less than 1 day's notice. By petition filed October 5, 1977, respondent requested that the Commission stay the effectiveness of its cancellation order.

In support of the petition, respondent notes its freight deficit and alleges that it would suffer irreparable harm from being unable to recover the funds provided by the disputed charge during the time the Commission's order remained effective. Respondent also wishes to avoid the consequent cost of tariff cancellation and republication. In contrast respondent alleges that a stay would preserve the status quo and not injure or prejudice GM. Alternatively respondent requests the Commission to grant a stay conditioned upon the LIRR refunding all amounts collected if the Commission is affirmed in docket No. 36516.

The extent of the irreparable injury urged by respondent is at best unclear. GM is also being injured to the extent that it is being deprived of the use of the amounts collected. Since respondent has clearly failed to support with appropriate evidence the reasonableness of the disputed maintenance charge and the extent of the alleged irreparable harm is uncertain, respondent's request for a stay will be denied.

It is ordered:

Petitioner's request for a stay of the Commission's order in this proceeding pending judicial review is denied.

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THE LONG ISLAND
RAIL ROAD COMPANY

ORDER OF THE INTERSTATE COMMERCE COMMISSION, FILED OCTOBER 14, 1977

Dated October 13, 1977.

By the Commission, Chairman O'Neal.

H. G. HOMME, Jr.
Acting Secretary

(SEAL)

NOTICE OF THE INTERSTATE COMMERCE COMMISSION,
FILED OCTOBER 19, 1977.

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

October 14, 1977

NO. 36516

SWITCH CONNECTION CHARGE AT BETHPAGE, N. Y.,
LONG ISLAND RAILROAD

(355 I.C.C. 201)

N O T I C E

A court action, entitled as shown below, was instituted on or about October 5, 1977, involving the above-entitled proceeding:

NO. 77-4175

THE LONG ISLAND RAIL ROAD COMPANY

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION

before the United States Court of Appeals for the Second Circuit.

H. G. HOMME, JR.,
Acting Secretary

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That on the 4th day of January , 19 78 , at the request of George M. Onken, Esq., Attorney at Law, Jamaica Station, Jamaica, New York,
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William Finch

Sworn to before me
this 4th day of January , 1978.

C. Jane Hoffman
Notary Public
C. JANE HOFFMAN
NOTARY PUBLIC
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